(1)
Supreme Court, U.S.
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No. 03-1715

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

JAMES A. LEWIS, dba B&H VENDORS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where this Court has held that the Robinson-Patman Act (the federal price discrimination statute) must be narrowly construed so as not to undermine the procompetitive purposes of the other federal antitrust laws, whether the unprecedented Court of Appeals' decision allowing "indirect" purchasers to sue under the Act even when they do not compete against "direct-buying" customers improperly expands the scope of the Act, directly conflicts with this Court's decision in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 358 (1968), and is contrary to rulings in other circuits.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner Philip Morris USA Inc., f/k/a/ Philip Morris Incorporated, is a wholly owned subsidiary of Altria Group, Inc.

Respondents are James A. Lewis d/b/a/ B&H Vendors, All Brands Vending Co., B&G Enterprises, Ltd., Belfiore Music & Cigarette Co., Class A Vending, C.I.C. Corporation, Eagle Coin Machine, Melo-Tone Vending, Inc., Penn Triple S t/a Penn Vending Company, and T.D. Rowe Corporation.

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Petitioner Philip Morris USA Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 355 F.3d 515 (6th Cir. 2004) and reproduced at appendix (App.) at 1a-46a. The decision of the United States District Court for the Middle District of Tennessee granting summary judgment to petitioner is unreported and is reproduced at App. at 47a-73a. The order of the Court of Appeals denying petitioner's petition for rehearing en banc is unreported and reproduced at App. at 74a. The order of the Court of Appeals staying its mandate pending certiorari is unreported and reproduced at App. at 76a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 2004. Petitioner's timely petition for rehearing en banc was denied on March 30, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13, provides in pertinent part:

> (a) Price; selection of customers. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade

and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

(d) Payment for services or facilities for processing or sale. It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc. It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without

processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

STATEMENT OF THE CASE

Although the Robinson-Patman Act, 15 U.S.C. § 13, is considered one of the nation's antitrust laws, courts and commentators have long recognized that its provisions often are not consistent with the fundamental antitrust goal of enhancing competition. *See, e.g., Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979) (Robinson-Patman Act should be "construed consistently with broader policies of the antitrust laws"); 14 Herbert Hovenkamp, *Antitrust Law* ¶ 2301a (1999) (discussing "tension between the Robinson-Patman Act and antitrust policy"). Accordingly, this Court has warned that the Act should be narrowly construed, so as not to "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust leglislation." *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953).

Thirty-six years ago, in a carefully crafted opinion, this Court recognized a very limited exception to the general rule that the Robinson-Patman Act does not confer rights upon "indirect" purchasers. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). There is no ambiguity concerning the limited scope of the *Fred Meyer* decision. This Court was precise in stating its holding: "We hold *only* that, *when a supplier gives allowances to a direct-buying retailer*, he must also make

them available on comparable terms to those who buy his products through wholesalers *and compete with the direct buyer* in resales." *Id.* at 358 (emphasis added).

The majority decision of the Court of Appeals below directly conflicts with this Court's holding in *Fred Meyer*. In a split decision, the Court of Appeals ruled that indirect purchasers lack standing to pursue claims under Robinson-Patman Section 2(a), but may sue under Sections 2(d) and 2(e) of the Act, even if these indirect purchasers do *not* compete against favored direct-buying customers. The Court of Appeals' unprecedented expansion of the Robinson-Patman Act ignores the Act's underlying legislative policies that provided the foundation for the *Fred Meyer* decision and have guided this Court's interpretations of the Act ever since. It is also out of step with the decisions of the other circuits regarding indirect-purchaser standing under Robinson-Patman and generates confusion on this important issue. If left standing, the decision will impose practical burdens on nationwide sellers that are inconsistent with the efficiency-enhancing goals of the antitrust laws.

1. Statutory Background. The Robinson-Patman Act, 15 U.S.C. § 13, was enacted in 1936 to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). The Act makes it unlawful, subject to a variety of statutory exceptions, for a seller to discriminate against competing customers with respect to prices (§ 2(a)), promotional allowances (§ 2(d)), or merchandising services (§ 2(e)). To constitute discrimination under the Act, a *single seller* must sell on different terms to two or more competing

customers. *See, e.g., FTC v. Morton Salt Co.*, 334 U.S. 37, 45 (1948). Those customers who purchase from wholesalers or other middlemen ordinarily do not have a right of action under the Robinson-Patman Act against the original seller. *See, e.g., Pierce v. Commercial Warehouse*, 876 F.2d 86, 87 (11th Cir. 1989).

2. Factual Background.

a. The Parties. Plaintiffs are ten companies that place and operate cigarette vending machines in various establishments, such as bars, nightclubs and restaurants, in parts of approximately 15 states.[1] Plaintiffs have stated that they operate a total of about 3,900 machines. Plaintiffs brought this action in February 1999, alleging that defendant violated Sections 2(a), (d) and (e) of the Robinson-Patman Act, beginning in November 1998, when it continued to provide merchandising programs to retail stores after terminating its vending machine merchandising program.

Defendant Philip Morris USA Inc. ("Philip Morris") sells cigarettes to direct-purchasing customers (primarily wholesalers), all of whom are charged the same price. These independent wholesalers, in turn, resell Philip Morris products to more than 400,000 outlets throughout the United

1. Joint Appendix submitted to the Sixth Circuit in this case (hereinafter referred to as "JA") at 392-96. There are over 200 vending machine plaintiffs in this action; however, in order to manage the litigation, the District Court entered an order as a result of which the claims of ten plaintiffs (and Philip Morris's counterclaims for fraud and breach of contract against four plaintiffs) were prepared for trial, while the remaining plaintiffs' claims were stayed. App. at 10a n.8. By stipulation and order, all the remaining claims in the case were deemed to be governed by the summary judgment.

States. These indirect purchasers are primarily retail stores, but they also include sub-jobbers, concessionaires, vending machine operators, and others. Philip Morris representatives call on about 200,000 retail stores, approximately 120,000 of which have chosen to participate in a Philip Morris merchandising program. JA at 1278.

b. Cigarette merchandising programs. There is intense competition between Philip Morris and the other cigarette manufacturers. JA at 1275. As part of that competition, Philip Morris and competing cigarette manufacturers offer merchandising programs to retail stores that choose to participate and satisfy the performance requirements. Prior to and during the relevant period, Philip Morris offered a program called Retail Masters, which was replaced in 1999 by Retail Leaders. These programs offer payments to participating retailers in return for merchandising services, including the use of special fixtures, prominent shelf placement, and the placement of Philip Morris products, displays, and signs. JA at 1278. Different retailers choose to participate at different performance levels, and Philip Morris's payments are graduated depending on the retailer's performance level. *Id.*

Philip Morris and competing cigarette manufacturers also offer a number of different retail promotions from time to time in support of their brands. Each brand has its own array and schedule of promotions. Philip Morris's retail promotions principally take one of three forms: price promotions (retailers are offered allowances to be used to lower the price to adult smokers of the promoted brand), product promotions (*e.g.*, buy two, get one free), and incentive promotions (*e.g.*, buy a pack of cigarettes, get a lighter as a gift). The conditions, rate, and duration of retail promotions vary from promotion to promotion. JA at 1279.

Philip Morris does not mandate the retail price as part of its price promotions or otherwise. Philip Morris sells its cigarettes to wholesalers at the same price. Every wholesaler sets its own price for sales to retailers, and every retailer sets its own price for sales to adult smokers. Philip Morris offers price promotion allowances to retailers on condition they reduce their regular price to adult smokers – whatever price that may be – by at least the amount of the allowance during the days the promotion is in effect. JA at 391. Philip Morris offers price promotions in this manner in order to ensure that the full amount of the price allowance is passed on to the adult smoker. In order to receive a promotional allowance, retailers must comply with the provisions of the particular promotion, which generally include communicating the retailer's promoted price and using approved signs to advertise the promotion. JA at 391, 1279-80.

For a number of years prior to November 1, 1998, Philip Morris had a merchandising program for vending machine operators known as Plan MV. Plan MV offered payments in exchange for stocking selected Philip Morris brands in vending machines and displaying an advertisement on the machine. JA at 1266-67, 1281-82. Philip Morris terminated Plan MV effective November 1, 1998, as a result of concerns regarding (i) the difficulty of controlling sales to minors through vending machines, (ii) the low levels of vendor participation in the program, (iii) the sale through vending machines of cigarettes designated for export only, and (iv) fraudulent submissions by vendors of payment requests for machines that did not exist or were not in compliance with contract terms. JA at 909. Audits conducted with respect to the payment requests of a sample of vending machine operators, including four of the ten plaintiffs, form the basis

for Philip Morris's breach of contract and fraud counterclaims against those plaintiffs.[2] JA at 1269-72.

c. Vending machine business. Vending machine cigarette prices have traditionally been 50 cents or more higher than the price in retail stores. JA at 406, 943. To obtain permission to place their machines on premises occupied primarily by other businesses, plaintiffs generally enter into contracts with the business owners or managers, requiring plaintiffs to pay commissions in varying amounts. These commissions are reflected in the prices charged for cigarettes in plaintiffs' machines. JA at 1651-58. During the relevant time period, some plaintiffs paid substantially lower wholesale prices for Philip Morris cigarettes by buying cigarettes intended only for export that had been re-imported to the United States. None of these plaintiffs charged lower prices for those products in their machines to reflect their lower costs. JA at 406-07.

In the last several decades, the cigarette industry in general, and the business environment for cigarette vending machines in particular, have undergone a great deal of change. Changes in laws and attitudes towards smoking have limited the places in which smoking is allowed and the places where cigarettes can be sold. From 1972 through 1998, U.S. factory shipments of cigarettes, which roughly equate to overall sales, declined by about 16 percent. JA at 400. Over the same period, domestic cigarette sales through vending machines declined by about 90 percent. *Id.* The downward trend

2. The audit showed that a substantial percentage of the machines for which the four audited plaintiffs requested payment under Plan MV were either nonexistent or not in compliance with the contractual terms. The audited plaintiffs' respective percentages of invalid claims were 96%, 95%, 79%, and 19%. JA at 1266-72.

continued after November 1998, when plaintiffs allege their claims arose.

Each of the plaintiffs in this case, along with other vending machine operators, sued the Federal Government before and during this lawsuit claiming that government action caused the elimination of "all economically viable uses of the plaintiffs' cigarette vending machines and placement contracts."[3] The complaints were originally filed in December 1997 and early 1998, and amended complaints were filed in 2000. The complaints allege that plaintiffs' business losses were the result of (i) actions by the Food and Drug Administration and (ii) the Federal Government's block grant program that encourages states to implement measures to reduce teen smoking. JA at 402-03. Plaintiffs alleged in 2000 that the adverse impact of the governmental actions "continues through today."[4] In the District Court, plaintiffs did not dispute any of the evidence proffered by Philip Morris showing that plaintiffs lost sales as a result of numerous factors, including state and local regulations, unrelated to any actions by Philip Morris. JA at 403-06.

3. District Court Proceedings. Plaintiffs alleged that, beginning in November 1998, Philip Morris violated

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3. The allegations appear in the complaints filed in *A-1 Amusement Co., Inc. et al. v. United States*, 98-192C (Ct. Fed. Cl. Mar. 20, 1998) and *A-1 Cigarette Vending, Inc., et al. v. United States*, 97-848C (Ct. Fed. Cl. Dec. 15, 1997, amended Jan. 9, 1998). JA at 1102, 1148-49. *See also B & G Enters., Ltd. v. United States*, 220 F.3d 1318, 1320-22 (Fed. Cir. 2000).

4. The allegations appear in the complaints filed in *A-1 Amusement Co., Inc. et al. v. United States*, 98-CV-192 (Ct. Fed. Cl. May 10, 2000) and *A-1 Cigarette Vending, Inc., et al. v. United States*, 97-848C (Ct. Fed. Cl. May 25, 2000). JA at 1142, 1172.

Sections 2(a), (d) and (e) of the Robinson-Patman Act by failing to offer vending machine operators promotional benefits that Philip Morris offered to retail outlets. The District Court's jurisdiction was based on 28 U.S.C. § 1337. After a two-day hearing, the District Court denied plaintiffs' motion for a preliminary injunction in June 1999. JA at 147. After the close of discovery, the District Court granted summary judgment for Philip Morris. Unlike *Fred Meyer*, there was no evidence in the record that any of the allegedly favored retailers purchased cigarettes directly from Philip Morris. App. at 20a-21a. The District Court ruled that the indirect-purchaser plaintiffs lacked standing to sue under the Act.[5] The District Court also ruled that plaintiffs had not submitted sufficient evidence to show that their vending machines compete against retail outlets, and therefore that they had no substantive cause of action for price discrimination under the Robinson-Patman Act. App. at 10a-11a.

4. The Court of Appeals Decision. A sharply divided Court of Appeals affirmed the District Court's ruling that indirect purchasers lack standing to sue under Section 2(a) of the Robinson-Patman Act but reversed the ruling as to Sections 2(d) and 2(e) of the Act.[6] Judge Moore, who authored the majority opinion on the Sections 2(d)

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5. This ruling applied to the eight plaintiffs who only purchased indirectly and partially to the two plaintiffs who had purchased some cigarettes directly from Philip Morris.

6. The Court of Appeals' holding with respect to Section 2(a) was based on Judge Rogers' opinion that indirect purchasers lack standing and Judge Katz's opinion that Section 2(a) is inapplicable to plaintiffs' claims. App. at 2a. The Court of Appeals also reversed the District Court's ruling with respect to the sufficiency of plaintiffs' evidence of competition between retail outlets and vending machines.

and (e) standing issue, concluded that despite the limited scope of this Court's *Fred Meyer* decision, all indirect purchasers should have standing to sue under Sections 2(d) and 2(e) of the Act. Judge Moore reached this conclusion not by reference to the legislative intent underlying the Robinson-Patman Act, but rather by invoking a technical rule of statutory construction – namely, that there is a "presumption" that a term used more than once in a statute should always have the same meaning. Judge Moore therefore concluded that since the statutory term "customer" had been interpreted to include indirect purchasers in some contexts (i.e., when they compete against direct-buying customers), the term should be interpreted to include indirect purchasers in other contexts, as well (i.e., when they compete against other indirect purchasers). App. at 41a-42a. Judge Katz, sitting by designation, concurred with Judge Moore that indirect purchasers have standing to sue under Sections 2(d) and 2(e).

Judge Rogers dissented. He found the majority's ruling to be "too great an extension of *Fred Meyer* . . . ." App. at 24a. Judge Rogers noted that this Court's ruling in *Fred Meyer* was intended to further the fundamental purpose of the Robinson-Patman Act – namely, to protect small, local retailers who competed against large, direct-buying chain stores. Because "unlike in *Fred Meyer*, the circumstances of this case do not reflect the underlying concern that motivated the passage of the Robinson-Patman Act in the first place," App. at 25a, Judge Rogers concluded that *Fred Meyer* should not be expanded to confer standing upon indirect purchasers under Sections 2(d) and 2(e) of the Act when they did not compete against direct-buying customers. App. at 24a-26a.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly admonished that the Robinson-Patman Act must be narrowly construed because it conflicts with the broader objectives of the antitrust laws.[7] The unprecedented majority decision of the Court of Appeals transgresses that admonition, conflicts with this Court's carefully circumscribed holding in *Fred Meyer,* and is inconsistent with the restrictive approach to indirect purchaser standing under the Act taken by at least four other circuits.

The established doctrine that courts must avoid rulings that expand the scope of the Robinson-Patman Act is soundly rooted in basic antitrust principles. The prohibitions in the Robinson-Patman Act often are not consistent with fundamental antitrust goals and, thus, may create obstacles to the sort of vigorous competition and efficiency-enhancing distribution systems that the other federal antitrust laws encourage. *See generally* 14 Hovenkamp, *supra*, ¶ 2301a (discussing "tension between the Robinson-Patman Act and antitrust policy"); Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust* 682 (1977) (Robinson-Patman Act "probably does more harm than good to competition"); Arnold Celnicker, *A Competitive Analysis of Most Favored Nations Clauses in Contracts,* 69 N.C. L. Rev. 863, 883-84 (1991) ("The legal prohibition of price discrimination is often anticompetitive."); U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 37, 99 (1977) (concluding that the Robinson-Patman Act reduces pricing flexibility, discourages the development of efficient distribution systems, and can

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7. *See Great Atl. & Pac. Tea Co.*, 440 U.S. at 80 n.13; *Automatic Canteen,* 346 U.S. at 63.

operate to the detriment of consumers). The decision below flies in the face of these established principles.

The decision below also conflicts with this Court's holding in *Fred Meyer*. The limited scope of that holding could not have been clearer: "We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales." 390 U.S. at 358. Although *Fred Meyer* has been the law of the land for more than thirty-six years, the majority decision of the Court of Appeals marks the first time that any court has ever construed *Fred Meyer* to permit an *indirect* purchaser to sue under Section 2(d) or 2(e) of the Robinson-Patman Act for alleged discrimination in favor of another *indirect* purchaser.

Fred Meyer is already at the outer fringe of this Court's precedents governing the rights of indirect purchasers to sue under the antitrust laws. In the years since *Fred Meyer* was decided, this Court has consistently declined to extend the protections of the antitrust laws to "indirect" plaintiffs. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (denying standing to indirect purchasers under Sherman Act); *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990) (refusing to recognize exception to *Illinois Brick*); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) (denying standing under Clayton Act to plaintiffs alleging "indirect" injury).

The Court of Appeals majority has taken the antitrust statute that has been most criticized as antithetical to antitrust policies, and has stretched the bounds of indirect purchaser standing to allow that statute to be more widely invoked than

Congress intended or any court has ever allowed. The effect of the decision below will be to deny manufacturers the flexibility to structure their promotional programs in the most efficient manner. The majority decision below calls into question widely used procompetitive promotional programs targeted to those downstream resellers who are most capable of marketing the manufacturer's products effectively.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *FTC v. FRED MEYER*

Because the express terms of the Robinson-Patman Act prohibit "any person" from discriminating in price or promotional benefits, this Court established long ago that the Act applies only when a *single seller* discriminates in sales to its competing customers. 15 U.S.C. § 13; *see Morton Salt*, 334 U.S. at 45; *Bruce's Juices, Inc. v. Am. Can Co.*, 330 U.S. 743, 755 (1947). Accordingly, as a general rule, an allegedly disfavored customer may bring a Robinson-Patman Act claim only if it purchases goods directly from the allegedly discriminating supplier. *See, e.g.*, *Pierce*, 876 F.2d at 87; 14 Hovenkamp, *supra*, ¶ 2311b. Indirect purchasers who deal with independent wholesalers or other middlemen ordinarily have no right to sue the original supplier for discriminatory pricing or promotional benefits. *Id.*

In *Fred Meyer*, this Court carved out a very narrow exception to the "single seller" rule, in order to protect small, local retailers from discrimination favoring large, *direct-buying* chain stores. The broad ruling below directly conflicts with this Court's limited ruling in *Fred Meyer*.

The *Fred Meyer* case involved an enforcement proceeding by the Federal Trade Commission. Fred Meyer,

Inc., a large supermarket retail chain, purchased certain products directly from two grocery suppliers. Fred Meyer induced these grocery suppliers to provide it with special allowances to pay for promotional coupons that were included in a coupon book that Fred Meyer provided to consumers shopping in its supermarkets. Numerous small grocery stores competed against Fred Meyer in the sale of the suppliers' products, but they purchased those products "indirectly" through wholesalers. The grocery suppliers who gave promotional allowances to Fred Meyer did not provide comparable promotional allowances to any of these small grocery stores.

The FTC alleged that the suppliers were systematically discriminating against small retailers by providing valuable promotional benefits to a large, *direct-purchasing* chain customer, while refusing to make similar benefits available to small stores that purchased their products *indirectly* through wholesalers. 390 U.S. at 354-56. This Court acknowledged that the literal language of Section 2(d) of the Robinson-Patman Act did not require the suppliers to provide promotional allowances to indirect-purchasing retailers. *Id.* at 355-57. However, recognizing that the language of the Act was "by no means . . . an exemplar of legislative clarity," *id.* at 349, this Court determined that the Act should not be construed solely by reference to its specific language, but rather by reference to its underlying purposes. *Id.* at 349, 355-56.[8]

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8. In his dissenting opinion, Justice Harlan noted that "the statute imposes a hodgepodge of confusing, inconsistent and frequently misdirected restrictions." 390 U.S. at 359-60. He criticized the majority for "read[ing] into the Act its own notions of how best to protect 'little people' from 'big people.'" *Id.* at 360. Justice Stewart (Cont'd)

The Court emphasized that the primary purpose of the Robinson-Patman Act was to "curb . . . devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Id.* at 349 (citation omitted). With that purpose in mind, the Court recognized a narrow exception to the established rule that the Robinson-Patman Act only prohibits a seller from discriminating between *direct-purchasing* customers. The Court emphasized that its ruling was strictly limited to the "concrete" fact pattern before it: "We hold *only* that, when a supplier gives allowances *to a direct-buying retailer*, he must also make them available on comparable terms to those who buy his products through wholesalers *and compete with the direct buyer* in resales." *Id.* at 358 (emphasis added); *see also id.* at 352 (defining "customer" in Section 2(d) to "include retailers who purchase through wholesalers *and compete with direct buyers in resales*") (emphasis added); *id.* (construing Act to encompass "retailers who buy through wholesalers and *compete with direct buyers*") (emphasis added).[9]

(Cont'd)
also dissented on the ground that the direct-buying wholesalers and not the indirect-buying small grocery stores were the suppliers' "customers" under Section 2(d). *Id.* at 363.

9. Not surprisingly, when the *Fred Meyer* decision was issued in 1968, contemporaneous legal commentary correctly emphasized the limited predicate for its holding – i.e., that the Act applied only where indirect purchasers competed against "direct" customers. *See, e.g.*, Note, 82 Harv. L. Rev. 266, 268 (1968-69) (suppliers must offer allowances to indirect purchasers "if they give similar advances to direct-buying retailers"); Note, 43 St. John's L. Rev. 254, 261 (1968-69) (*Fred Meyer* applies "[a]s long as a retailer who purchases through a wholesaler competes with a direct buyer"); Note, 15 Vill. L. Rev. 443, 444 (1970) (under *Fred Meyer*, a manufacturer must provide promotions to indirect purchasers in proportion to promotions "given by the manufacturer to direct-buying retail customers").

The majority below, however, brushed aside the narrow holding of *Fred Meyer*, and construed the Act to confer standing upon indirect purchasers who compete only against other *indirect* purchasers. In the thirty-six years since *Fred Meyer* no other court has so held. This overbroad interpretation of the Act is divorced from both the text of the Act and the congressional purpose underlying the Act. Indeed, the majority below did exactly what the *Fred Meyer* Court had refused to do: it construed the Act without due regard for its legislative intent, by applying technical "rules" of statutory construction in an effort to discern the meaning of a single word used in the Act ("customer").[10] Noting that the word "customer" appeared three times in Section 2(d), the Court of Appeals majority endorsed a principle of statutory construction that "the same words used twice in the same act have the same meaning." App. at 41a (citing treatise on statutory construction). The court reasoned that since the Supreme Court had allowed indirect purchasers to be included in the definition of a disfavored "customer," indirect purchasers must also be included within the definition of the same word when it referred to the favored party. *Id.* at 40a.

However, nothing in *Fred Meyer* suggests that this Court was seeking to develop a uniform definition of the word "customer" in each part of the statute, without regard to the factual circumstances in which a claim arose and without regard to the legislative policies served by the Act. To the contrary, this Court explicitly stated that "it would be both

10. The Court of Appeals acknowledged that the *Fred Meyer* Court had engaged in a "functional analysis" of the Act rather than a parsing of its literal terms, and that such a "functional analysis" would not "weigh as heavily" in support of the Court of Appeals' ruling in this case. App. at 41a.

inappropriate and unwise to attempt to formulate an all embracing rule applying the elusive language of the section . . . ." 390 U.S. at 357; *see also Automatic Canteen*, 346 U.S. at 64 (noting that since "precision of expression is not an outstanding characteristic" of the Act, courts must be careful "to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings").

The Court of Appeals' expansion of the Robinson-Patman Act, unrelated to any congressional purpose, is also inconsistent with the repeated admonitions of this Court that the Act should be "construed consistently with broader policies of the antitrust laws." *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80 n.13. As courts and economists have often noted, there is nothing inherently anticompetitive about price or promotional discrimination – indeed, targeted promotional activity is often procompetitive. *See, e.g.*, 14 Hovenkamp, *Antitrust Law, supra*, ¶ 2301; Harry First, *An Antitrust Remedy for Int'l Price Predation*, 4 Pac. Rim L. & Pol'y J. 211, 239 (1995) ("If anything, the current view is that price discrimination often serves pro-competitive ends."). That is why this Court has cautioned that the Robinson-Patman Act should not be construed to expand its prohibitions beyond their intended scope. *E.g., Automatic Canteen*, 346 U.S. at 63 (warning against interpretations that "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"). *See also* 14 Hovenkamp, *supra*, ¶ 2301a ("limiting the Robinson-Patman Act to situations in which powerful buyers extracted discriminatory concessions contrary to their supplier's independent interest could serve to make the Act operate more competitively").

The decision below is precisely the type of unwarranted expansion of the Act that this Court has admonished lower courts to avoid. In this regard, it is noteworthy that the Ninth Circuit has interpreted *Fred Meyer* in a far more restricted fashion. In *Labrador, Inc. v. Iams Co.*, 105 F.3d 665 (table), 1997-1 Trade Cas. (CCH) ¶ 71,740, 1997 WL 8450 (9th Cir. Jan. 8, 1997), an indirect-purchasing retailer sued a manufacturer for providing certain direct-purchasing retailers with preferential prices, incentives, and services. The Ninth Circuit ruled that this Court's decision in *Fred Meyer* was not intended to confer standing upon indirect purchasers in private antitrust suits at all; rather, the Ninth Circuit viewed *Fred Meyer* as simply an interpretation of the substantive scope of the Act in a government enforcement proceeding. The court concluded that *Fred Meyer* "does not permit indirect purchasers to bring claims themselves . . . ." 1997 WL 8450, at *1. The narrow construction of *Fred Meyer* by the Ninth Circuit is irreconcilable with the expansive construction of *Fred Meyer* by the Court of Appeals below.

II. THE DECISION BELOW IS ALSO INCONSISTENT WITH CASES IN THE SECOND, THIRD, FIFTH, AND ELEVENTH CIRCUITS ADDRESSING "INDIRECT PURCHASER" STANDING

In addition to conflicting with this Court's decision in *Fred Meyer*, the decision below warrants review by this Court because it is inconsistent with decisions by several other circuit courts addressing the broader question of when, if ever, an indirect purchaser should have standing to sue under the Robinson-Patman Act.[11] In line with this Court's

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11. To divert attention from these adverse case precedents, plaintiffs argued that the Federal Trade Commission has implicitly (Cont'd)

admonition that the Robinson-Patman Act should not be expansively construed so as to undermine the basic goals of antitrust policy, other circuits have granted standing to indirect purchasers to bring Robinson-Patman claims only under exceedingly narrow circumstances not present in this case. The holding of the Court of Appeals majority that "indirect" purchasers have standing to sue under the Robinson-Patman Act, even if they do not compete against "direct-buying" customers, is contrary to the broader legal barriers to "indirect purchaser" standing that other circuits have erected and that have, until now, been the generally accepted jurisprudence on this fundamental issue.

1. Indirect Purchaser Standing in the Second, Fifth, and Eleventh Circuits. The Second, Fifth, and Eleventh Circuits have recognized a very limited right of indirect purchasers

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(Cont'd)
endorsed a reading of the Robinson-Patman Act similar to that adopted by the Court of Appeals majority, in its "Guides for Advertising Allowances and Other Merchandising Payments and Services," 16 C.F.R. § 240. The FTC Guides define "customer" to include all purchasers, even those who purchase through intermediaries. However, the FTC Guides expressly state that they "do not have the force of law" and that they are intended solely to "provide assistance to businesses" in structuring their promotional programs. 16 C.F.R. § 240.1. It is not surprising that the FTC chose to offer a simple, albeit overbroad, guideline for defining "customer" – since the purpose of the FTC Guides was to provide businesses with practical advice to help them steer clear of any legal entanglements. In any event, no court has suggested that these FTC Guides constitute legal precedent, let alone authority for how to construe this Court's decision in *Fred Meyer*. *Cf. Nat'l Auto Brokers Corp. v. Gen. Motors Corp.*, 376 F. Supp. 620, 630 (S.D.N.Y. 1974) (questioning the "authority and applicability" of the FTC Guides), *aff'd*, 572 F.2d 953 (2d Cir. 1978).

to bring Robinson-Patman claims, based on a standard that retains the integrity of the "single seller" principle – a far cry from the unprecedented standard applied by the Court of Appeals below. In these circuits, the indirect purchaser doctrine has been invoked only where a manufacturer uses "dummy" wholesalers, controlled by the manufacturer, to make "sham sales" to indirect customers. *See Pierce*, 876 at 88 ("The record does not indicate that the resales of manufacturers' parts from the [distributors] to the [indirect purchasing jobbers] were sham sales that in truth and fact were controlled by the manufacturers."); *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 7-8 (5th Cir. 1969) ("The thrust of this so-called 'indirect purchaser' doctrine is that a manufacturer, by utilizing the subterfuge of a 'dummy' wholesaler or distributor, should not be able to evade the price discrimination provisions of the Robinson-Patman Act."); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1028 (2d Cir. 1976) (noting that the indirect purchaser doctrine originated "as a means of preventing a manufacturer from insulating itself from Robinson-Patman liability by using a 'dummy' wholesaler to make sales at terms actually controlled by the manufacturer").

This limited form of "indirect purchaser" rule has been applied in cases under Robinson-Patman Sections 2(a), (d) and (e) and was acknowledged by the Court in *Fred Meyer*.[12] The rule is conceptually consistent with the

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12. *See* 390 U.S. at 353. Specifically, the *Fred Meyer* Court acknowledged "the 'indirect customer' doctrine under which the [Federal Trade] Commission and the courts impose § 2(d) liability when a supplier in effect supplants his intermediate distributors in dealings with those to whom the distributors resell and favors some of the distributors' accounts over others." *Id.* The Court concluded

(Cont'd)

established "single seller" requirement under Robinson-Patman as well as the *Illinois Brick* "indirect purchaser" ban, where this Court recognized a possible exception for indirect customers that "control" the direct purchaser. *Illinois Brick*, 431 U.S. at 736 n.16; *see also Jewish Hosp. Ass'n v. Stewart Mech. Enter., Inc.*, 628 F.2d 971, 975 (6th Cir. 1980) (noting "*Illinois Brick* Court's emphasis upon the narrow scope of exemptions to the indirect purchaser rule"). However, the Court of Appeals' overbroad interpretation of *Fred Meyer* completely swallows the more restrictive standing rule recognized by these other circuits. By expanding the scope of *Fred Meyer* to confer standing upon indirect purchasers generally – even where they purchase from independent wholesalers who are not "controlled" by a single seller – the Court of Appeals' decision cannot be reconciled with cases in other circuits granting "indirect purchaser" standing only if a manufacturer "controls" the terms of sale offered by "dummy" wholesalers to indirect purchasers.[13]

2. Indirect Purchaser Standing in the Third Circuit. The decision below is also contrary to the established law in the Third Circuit, which has not recognized any form of

(Cont'd)
that "[w]e need not and do not question the validity of this doctrine as applied to pierce a supplier's unrealistic claim that a reseller favored by him is actually the consumer of an intermediate distributor." *Id.*

13. The Sixth Circuit previously recognized a similar rule that indirect purchasers may sue a remote supplier if that supplier uses "dummy" wholesalers to make sham sales that are actually controlled by the supplier. *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74 (6th Cir. 1981). However, the Court of Appeals majority did not rely on the "dummy" wholesaler test in this case or take issue with Judge Rogers' observation that the record was devoid of any showing that Philip Morris controlled the wholesalers. App. at 21a, 24a.

"indirect purchaser" standing under the Robinson-Patman Act. Twelve years before this Court's *Fred Meyer* decision, the Third Circuit in *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956), held that an indirect-purchasing retailer could not sue under Section 2(a) of the Robinson-Patman Act to recover for alleged discrimination in favor of a competing direct-purchasing retailer. The court reasoned that where the plaintiff did not purchase directly from the supplier, "[i]t follows that the necessary requisite of two purchasers from the same vendor is not met and [the plaintiff] therefore can claim no protection under the Act as a direct purchaser." 237 F.2d at 15.

The ban on indirect purchaser standing in *Klein* has been reaffirmed by the Third Circuit in the aftermath of this Court's *Fred Meyer* decision. In *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), the Third Circuit affirmed the dismissal of the Robinson-Patman Section 2(a) claims brought by two distributors on the ground that the distributors did not purchase directly from the defendant supplier. 637 F.2d at 122 (holding that because "[n]either [plaintiff] purchased fuel from [the defendant supplier], they cannot assert claims for damages under . . . Section 2(a) of the Robinson-Patman Act"). More recently, the Third Circuit in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), affirmed that its "controlling cases on this question of standing [under the Robinson-Patman Act] are *Klein* . . . and *Sweeney*." 909 F.2d at 1543. We are aware of no Third Circuit decision conferring standing upon "indirect" purchasers to sue under Section 2(d) or 2(e).

III. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AFFECTING PRODUCT PROMOTION AND DISTRIBUTION

The decision below will undoubtedly create considerable confusion in the business community regarding the reach of the Robinson-Patman Act. Under the novel view of the Robinson-Patman Act adopted by the Court of Appeals majority, nationwide sellers will be faced with four options, none of which advances the efficiency goals of antitrust law: (i) sellers may maintain a uniform nationwide program that rigidly extends promotional benefits to all indirect purchasers, even those that may not use such benefits productively; (ii) sellers may opt to discontinue or substantially curtail promotional programs to avoid the risks and burdens of indirect-purchaser lawsuits, (iii) sellers may offer a different marketing program in Kentucky, Michigan, Ohio, and Tennessee than in the rest of the nation to conform to the interpretation of *Fred Meyer* adopted by the Sixth Circuit (although this approach still carries risks if suits could be filed within the Sixth Circuit), or (iv) sellers may establish a nationwide program that provides promotional benefits in accordance with sound economics and legitimate business goals, but which subjects the sellers to potential liability suits under the lenient indirect purchaser standing rule in the Sixth Circuit.[14]

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14. Shortly after the Sixth Circuit denied rehearing en banc in this action, plaintiffs and approximately 220 other vending machine operators filed similar claims under Robinson-Patman Sections 2(a), (d) and (e) against two other cigarette manufacturers. *Genesee Vending, Inc., et al. v. Lorillard Tobacco Co.*, Civil Action No. 04-60091 (E.D. Mich.); *Genesee Vending, Inc., et al. v. R. J. Reynolds Tobacco Co.*, Civil Action No. 04-71834 (E.D. Mich.).

The result is precisely the type of "rigidity" in competitive marketing that the Supreme Court sought to avoid when it warned against unwarranted expansions of the Robinson-Patman Act. *See Automatic Canteen*, 346 U.S. at 63. The policies and goals of this nation's antitrust laws are not furthered by requiring a manufacturer to provide promotional benefits to vending machine operators *to whom it does not sell,* simply because that manufacturer has determined that it can market its products efficiently by providing certain promotional programs to convenience stores *to whom it does not sell.*

Fred Meyer, by extending the Robinson-Patman Act to small, indirect retailers who compete against large, *direct-buying* chains, goes as far as can be justified by the principles underlying the Act in spreading the protective blanket of this oft-criticized statute. This Court should not permit lower courts to hinder efficient competitive programs by expanding the statute even further.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JANUARY 15, 2004

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 01-6174, 01-6502.

JAMES A. LEWIS, doing business as B & H Vendors; PENN VENDING COMPANY; EAGLE COIN MACHINE; BELFIORE MUSIC & CIGARETTE COMPANY; B & G ENTERPRISES, LTD.; ALL BRANDS VENDING CO., INC.; CLASS A VENDING; C.I.C. CORPORATION; MELO-TONE VENDING, INC.; T.D. ROWE CORPORATION,

Plaintiffs-Appellants,

v.

PHILIP MORRIS INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 99-00099—Thomas A. Higgins, District Judge.

Argued: April 30, 2003.

Decided and Filed: Jan. 15, 2004.

Before MOORE and ROGERS, Circuit Judges; KATZ, District Judge.*

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* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

Appendix A

ROGERS, J., announced the judgment of the court and delivered an opinion, in which MOORE and KATZ, concurred except as to Part II.B. MOORE, J. [pp. 36a-46a], delivered a separate opinion, in which KATZ, D. J., concurred as to the issues addressed in Parts I and II, which constitutes the opinion of the court of the court on these issues.

OPINION

PER CURIAM. Judge Moore would reverse on all the claims as to which the district court granted summary judgment. Judge Rogers would affirm the summary judgment against plaintiffs who have purchased indirectly from defendant, but he would reverse summary judgment entered against plaintiffs who purchase directly from defendant. Judge Katz would find that all violations of the Act are properly analyzed under §§ 2(d) and (e) and not § 2(a), and thus would affirm summary judgment as to the § 2(a) claims on grounds alternative to those relied on by the district court. Summary judgment is therefore REVERSED on Count I as to all plaintiffs and on Count II as to those plaintiffs who purchase directly from defendant and AFFIRMED on Count II as to those plaintiffs who do not purchase directly from defendant, and the case is REMANDED for further proceedings.

ROGERS, Circuit Judge.

This case involves the grant of summary judgment in favor of Philip Morris, Inc.[1] in a Robinson-Patman Act case. Cigarette vending machine owners and operators ("vendors")

1. Philip Morris, Inc. changed its name effective on January 15, 2003, to Philip Morris USA, Inc.

sued Philip Morris under section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (d), and (e) (the "Act"), alleging that Philip Morris had violated these provisions by failing to provide vendors with promotional fees and programs in the same manner that it provided such fees and programs to other retailers. The district court granted Philip Morris summary judgment, holding that eight out of ten of the plaintiff vendors did not have standing because they did not purchase cigarettes directly from Philip Morris, and, alternatively, no plaintiffs proved that they were in competition with the other retailers. I would hold that the vendors who did not purchase directly from Philip Morris lacked statutory standing, but that the remaining plaintiffs who have standing are in competition with the other retailers.[2]

I. BACKGROUND

A. *The Robinson-Patman Act*

The Robinson-Patman Act was passed in 1936 as an amendment to the Clayton Act.[3] The Clayton Act is an antitrust law that primarily protected against "primary line" price discrimination, or price discrimination tending to injure the price discriminator's competitors. 14 Hovenkamp,

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2. Judges Moore and Katz concur in this opinion except as to Part II.B.

3. We must visit this statutory realm although "[n]o one, it appears, dwells longer than necessary in the land of Robinson-Patman." Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L.Rev. 1113, 1118 (1983).

Appendix A

Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 2302 (1999) (*Hovenkamp*) ("[T]he concern with original § 2 of the Clayton Act was entirely with what we today would call 'primary-line' price discrimination."); *see also George Haug Co., Inc. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 141 n. 2 (2d Cir.1998) (defining primary-line price discrimination). In response to criticism that the Clayton Act did not protect small retail stores from the concentrated buying power of larger chain stores, Congress passed the Robinson-Patman Act. The reason for its enactment was to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). The Robinson-Patman Act protects against primary-line violations, *see, e.g., FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), and also, significantly for this case, against "secondary-line" violations, those that occur "when a seller's discrimination impacts competition among the seller's customers; i.e., the favored purchasers and disfavored purchasers." *George Haug Co., supra.* The present case involves an alleged secondary-line violation because it is the competitors of the favored purchasers that are claiming discrimination rather than the competitors of Philip Morris.

B. *The Cause of the Controversy*

This case involves claims that Philip Morris discriminated against machine vendors of cigarettes in favor of another class of cigarette seller—convenience stores, mini-marts and gas stations (collectively referred to as "convenience stores"). On November 1, 1998, Philip Morris

terminated a program, called Plan MV, under which it paid fees to vendors if they followed certain guidelines regarding the placement of advertising materials on their vending machines and the location of Philip Morris cigarettes in certain slots of the machines. Philip Morris thereafter instituted new programs for convenience stores that provided for price promotions, product promotions, and incentive promotions in exchange for the convenience stores' participation in the programs. Under the new price promotion programs, Philip Morris paid an amount of money to convenience stores for every carton or pack of Philip Morris cigarettes sold as long as the customer received a discount in an amount equal to the price promotion.[4] An example of a product promotion was one in which, if the consumer bought one pack, the consumer would get one pack free. With an incentive promotion, the stores were given gifts to give away to cigarette purchasers. These programs were called the Retail Masters, Retail Leaders and Ranch Party '99 Programs. Vendors allege that after the programs went into effect, vendors were unable to compete with the convenience stores' low prices, thereby incurring substantial losses.

C. *Statutory scheme*

Claiming that they are "in competition" with convenience stores, vendors alleged violations of sections 2(a), 2(d)

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4. One example of a price promotion program took place after Philip Morris entered into a settlement with states' attorneys general that provided for a mandatory payment of 45 cents per pack sold into a settlement fund. Philip Morris increased the cost of its cigarettes by 45 cents, but Philip Morris agreed to rebate the 45 cents to convenience stores participating in promotional programs.

and 2(e) of the Robinson- Patman Act. Section 2(a) prohibits a supplier from "discriminat[ing] in price between different purchasers of like grade and quality" where "the effect is substantially to lessen competition."[5] 15 U.S.C. § 13(a). Section 2(a) protects against direct and indirect price discrimination. *American News Co. v. FTC,* 300 F.2d 104, 109 (2d Cir.1962). Direct discrimination occurs when a seller charges different prices to different buyers. *Robbins Flooring, Inc. v. Fed. Floors, Inc.,* 445 F.Supp. 4, 8 (E.D.Pa.1977).

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5. Section 2(a) provides in part:

> (a) Price; selection of customers. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a). Although the statute refers to price discrimination, it has been interpreted to prohibit price differences. *F.T.C. v. Anheuser-Busch, Inc.,* 363 U.S. 536, 549 (1960) (primary line case); *but see FLM Collision Parts, Inc. v. Ford Motor Co.,* 543 F.2d 1019 (2d Cir.1976) (secondary line case holding that equality of treatment among purchasers does not require a single uniform price under all circumstances); *Edward J. Sweeney & Sons v. Texaco, Inc.,* 637 F.2d 105, 120 (3d Cir.1980) (similar).

Indirect discrimination occurs "when one buyer receives something of value not offered to other buyers," such as free goods. *Id.*

Section 2(a) applies only if "two or more consummated sales of commodities of like grade and quality are made at discriminatory prices by the same seller to two or more different purchasers contemporaneously or within the same approximate time period." Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis,* 51 Fordham L.Rev. 1113, 1127-28 (1983) (footnotes omitted). Therefore, to be able to sue under section 2(a), the plaintiff must be a "purchaser."

In a secondary-line section 2(a) case, the plaintiff who is the disfavored purchaser, must show that it competes with the favored purchaser. *O'Byrne v. Cheker Oil Co.,* 727 F.2d 159, 164 (7th Cir.1984); *National Distillers & Chem. Corp. v. Brad's Mach. Prods.,* 666 F.2d 492, 496 (11th Cir.1982); *M.C. Mfg. Co. v. Texas Foundries,* 517 F.2d 1059, 1066 (5th Cir.1975). To show that the disfavored purchaser is injured, the disfavored purchaser and the favored purchaser must be in the same geographic market. *Hovenkamp* ¶ 2333b3.

Sections 2(d) and (e) of the Act deal with discrimination in the field of promotional services made available to purchasers who buy for resale. Where the seller pays the buyer to perform the service, Section 2(d) applies.[6] "Where the

6. Section 2(d) provides:

(d) Payment for services or facilities for processing or sale. It shall be unlawful for any person engaged in

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seller furnishes the service itself to the buyer, Section 2(e) applies."[7] *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909

(Cont'd)

> commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C. § 13(d). Section 2(d)'s prohibition includes "paying allowances for advertising or other sales promotion services or facilities." *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 209 (3d Cir.1980); *see also American News Co.*, 300 F.2d at 109 ("Section 2(d) was aimed explicitly at promotional allowances which have the effect of price adjustments.").

7. Section 2(e) provides:

> (e) Furnishing services or facilities for processing, handling, etc. It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e).

(7th Cir.1973) (quoting F.T.C. Guides for Advertising Allowances and Other Merchandising Payments and Services (1960)).

> Among those "services and facilities" held to be within Sections 2(d) and 2(e) have been any kind of advertising, catalogs, demonstrators, display and storage cabinets, display materials, hand bills, special packaging or package sizes, warehouse facilities, accepting returns for credit, prizes or merchandise for conducting promotional contests, and "monetary awards" paid by the seller to clerks, salesmen, and other employees of the customer for special sales or promotional efforts.

Cecil Corley v. Motor Corp., 380 F.Supp. at 850 (citation omitted). Sections 2(d) and (e) tend to be considered together. *See Kirby,* 489 F.2d at 909 ("[Section] 2(e) has long been viewed as coterminous with § 2(d), and courts have consistently resolved the two sections into an harmonious whole.").

In order to bring a private enforcement action under the Robinson-Patman Act, the plaintiff must be a "purchaser" or "customer." *See* §§ 2(a), (d), and (e); *Barnosky Oils, Inc. v. Union Oil Co. of California,* 665 F.2d 74, 84 (6th Cir.1981) (finding that plaintiff that did not purchase directly from defendant was not a "purchaser" under § 2(a) of the Act). Although section 2(d) refers to "customers" and section 2(e) deals with "purchasers," the words in those two subsections have been interpreted to have the same meaning. *Hovenkamp* ¶ 2363b. Also, as with § 2(a), a plaintiff alleging a violation

of §§ 2(d) and (e) must show that it competes with the favored purchaser, and the competition must be in the same geographic area. *George Haug Co., Inc.*, 148 F.3d at 145 (stating, in relation to section 2(d) and 2(e) claims, "[t]he plaintiff must demonstrate that the goods or commodity apply only to offers to customers competing in the same geographic area").

D. *Proceedings below*

Vendors[8] filed suit against Philip Morris alleging that it had violated sections 2(a), 2(d) and 2(e) of the Robinson-Patman Act. Vendors alleged (1) that Philip Morris did not offer the promotional allowances and rebates to vendors on proportionally equal terms as the convenience stores; (2) that the prices paid by vendors were not proportional to the prices

8. This case began with over 200 vendors, but the district court entered an order severing the claims of eleven vendors and consolidating those for pretrial proceedings. One vendor's claims were voluntarily dismissed, leaving ten vendors in this appeal. Those ten vendors are James A. Lewis d/b/a B & H Vendors, B & G Enterprises, Ltd., Penn Triple S trading as Penn Vending Company, Eagle Coin Machine, All Brands Vending Co., Inc., Belfiore Music & Cigarette Co., Class A Vending, Melo-Tone Vending, Inc., T.D. Rowe Corp., and C.I.C. Corporation. All parties entered into a joint written stipulation that if the district court's order is not reversed on appeal, the claims of the remaining plaintiffs will be dismissed with prejudice. The parties also stipulated that if the claims of all the plaintiffs are dismissed with prejudice in their entirety, the counterclaims of Philip Morris will be dismissed with prejudice. The district court accordingly made an express determination pursuant to F.R.Civ.P. 54(b) that there was no just reason for delay in permitting an appeal of its summary judgment order in this case.

paid by the convenience stores after taking into account the rebates and promotional allowances; and (3) that Philip Morris provided the convenience stores with advertising services and materials without offering the same to vendors, all in violation of sections 2(d) and 2(e). Vendors further alleged that Philip Morris committed price discrimination in violation of section 2(a) by offering the rebates and promotional allowances to the convenience stores without making the offers available to vendors.

Philip Morris moved for summary judgment on the grounds that (1) eight vendors did not purchase directly from Philip Morris and the other two only purchased some of their cigarettes from Philip Morris and therefore vendors did not have standing, (2) vendors did not prove that cigarette sales declined in response to the promotional programs, and (3) vendors did not prove that the vending machines were in competition with the convenience stores.

The district court granted summary judgment against eight vendors for lack of standing,[9] partial summary judgment against the remaining two vendors for lack of standing,[10] and in the alternative concluded that summary judgment would be proper against all ten plaintiff vendors for failure to show that they compete with the convenience stores.

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9. Those vendors were B & H Vendors, B & G Enterprises, Ltd., Eagle Coin Machine, All Brands Vending Co., Inc., Belfiore Music & Cigarette Co., Class A Vending, Melo-Tone Vending, Inc., and T.D. Rowe Corp.

10. The two vendors were Penn Triple S trading as Penn Vending Company, and C.I.C. Corporation.

II. ANALYSIS

A. *Standard of Review*

The standard of review of a district court's grant of summary judgment is de novo. *Williams v. General Motors Corp.*, 187 F.3d 553, 560 (6th Cir.1999). Summary judgment will be granted where there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "We must view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir.2002).

B. *Statutory Standing*[11]

1.

The district court in this case found that those vendors who purchased cigarettes through a wholesaler did not have statutory standing. The district court's conclusion is correct, but some additional steps are necessary to arrive at that conclusion. Relying upon our decision in *Barnosky Oils, Inc. v. Union Oil Co. of California*, 665 F.2d 74 (6th Cir.1981), the district court reasoned that Philip Morris did not so completely control the prices by which wholesalers sold to vendors as to meet the requirements of the so-called "indirect purchaser" theory. The "indirect purchaser" theory considers a plaintiff who has purchased through a middleman to be a

11. Judges Moore and Katz do not concur in this subsection.

"purchaser" for Robinson-Patman purposes if the supplier "sets or controls" the resale prices paid by the plaintiff. *Barnosky Oils,* 665 F.2d at 84. On appeal, vendors argue that the Supreme Court's decision in *FTC v. Fred Meyer, Inc.,* 390 U.S. 341 (1968), requires the conclusion that a retailer buying through a wholesaler can state a Robinson-Patman claim without being a direct purchaser as long as the retailer competes with a favored retailer who is a purchaser from the supplier. Here, however, unlike in *Fred Meyer,* the allegedly favored retailers (the convenience stores) also buy through wholesalers. Vendors argue that the indirect purchaser theory, typically used to show that the disfavored retailer is a purchaser, may be used to establish that the *favored* retailer is a purchaser. If so, vendors argue, *Fred Meyer* establishes that the fact that they compete with the convenience stores is sufficient for the vendors to have standing, even though the plaintiff vendors buy through wholesalers.

In order to reconcile the holdings of *Fred Meyer* and our subsequent holding in *Barnosky Oils,* it is necessary to distinguish between claims brought under section 2(a) and claims brought under sections 2(d) and (e). *Barnosky Oils* was a section 2(a) case, while *Fred Meyer* was a section 2(d) case. The parties appear to talk past each other on appeal, in part because they—like the district court—treat section 2(a) and sections 2(d) and (e) as if, for the purposes of this case, they should be analyzed the same way. It is easier, however, to reconcile the controlling case law by treating section 2(a) separately from sections 2(d) and (e). When separately considered, it becomes clear that the district court was correct

in granting summary judgment against the plaintiff vendors who purchase through wholesalers.[12]

2.

Section 2(a) deals with price discrimination in the original sale to the purchaser, whereas sections 2(d) and (e) address the purchaser's subsequent resale of the product. Sections 2(d) and (e) prohibit discrimination in giving, or reimbursing for, promotional services to purchasers who buy for resale. *Rickles, Inc. v. Frances Denney Corp.*, 508 F.Supp. 4, 6 (D.C.Mass.1980) ("'(A) seller's payments as well as services in connection with the original sale to the purchaser rather than with regard to the purchaser's subsequent resale were not cognizable under §§ 2(d) or 2(e) but were challengeable only under § 2(a) as indirect price discrimination.'" (quoting *Kirby v. P.R. Mallory & Co., Inc.*, 489 F.2d 904, 909 (7th Cir.1973)) (alternation in original)). Economists might observe that the ultimate economic effect of the different types of discrimination (i.e., price discrimination and discrimination in providing services that increase resales) is the same, since in either case one purchaser for resale is getting an economic benefit from the supplier that another is not getting. But Congress saw fit to distinguish between the two, apparently on the basis of how indirect the benefit was. Unlike section 2(a), violations of sections 2(d) and 2(e) do not explicitly require an injury to

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12. My analysis does not require that plaintiffs' § 2(a) claims be analyzed as § 2(d) and (e) claims. Such a recategorization was not argued by the parties in this case.

competition.[13] In addition, with respect to sections 2(d) and 2(e) the defendant does not have the same defenses that a defendant has under section 2(a). Under section 2(a) a defendant has two defenses: cost justification and meeting competition. Under sections 2(d) and (e), the defendant only has the meeting competition defense. *Hovenkamp* ¶ 2322; *see also* Note, *The Distinction Between the Scope of Section 2(a) and Sections 2(d) and 2(e) of the Robinson-Patman Act,* 83 Mich. L.Rev. 1584, 1585-86 (1985). Given that Congress distinguished between section 2(a) claims on the one hand, and section 2(d) and (e) claims on the other, roughly on the basis of the indirectness of the discrimination, it makes sense that holdings regarding the closeness of the competing purchasers to the suppliers be limited to the particular statutory context in which they arose, at least where that permits us to reconcile controlling precedents.

The Supreme Court's holding in *Fred Meyer* dealt with section 2(d), and therefore does not support plaintiff vendors' arguments regarding their claims under section 2(a). In *Fred Meyer,* Fred Meyer, a large retail supermarket, annually conducted a sale campaign by selling coupon booklets to customers for ten cents. The booklet contained coupons for products sold by Fred Meyer, some amounting to a one-third reduction in cost. *Id.* at 344-45. Each coupon

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13. In private suits, however, courts have required injury-in-fact and causation. *Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 734 (9th Cir.1987) (noting that a plaintiff must allege an "actual injury attributable to something the antitrust laws were designed to prevent" and that its "failing to receive a promotional allowance . . . adversely affected its ability to compete with favored competitors"); *Hovenkamp* ¶ 2363.

related to a specific product and the suppliers of the products paid Fred Meyer $350 for each page advertising the product in the booklet. Also, some suppliers would give Fred Meyer "price reductions on its purchases of featured items, by replacing at no cost a percentage of the goods sold by [Fred] Meyer during the campaign, or by redeeming coupons in cash at an agreed rate." *Id.* at 345. Fred Meyer's sale campaign was very successful, and the $350 paid by suppliers more than paid for the costs of publishing and distributing the booklets. *Id.* at 345 n. 4. The promotional benefits provided by the suppliers to Fred Meyer were not bestowed upon other retailers that purchased from wholesalers. The Federal Trade Commission found that

> this promotional scheme . . . violated §§ 2(d) and 2(a) in the following respects: First, the $350 paid to Meyer by each of four suppliers participating in the campaigns represented promotional allowances paid in violation of § 2(d) because similar allowances were not made available on proportionally equal terms to competing customers. Second, the additional value given Meyer by these suppliers in the form of discounts, free replacements of goods sold and coupon redemptions amounted to price discrimination prohibited by § 2(a).

Id. at 345.

The Supreme Court, focusing its decision solely on § 2(d), found that the "discriminatory promotional allowances" given to Fred Meyer by two suppliers were

covered under § 2(d). *Id.* at 348, 88 S.Ct. 904. Those allowances were given when two suppliers, Tri-Valley Packing Association and Idaho Canning Company, (1) replaced without charge every third can of product sold under a three-for-the-price-of-two coupon campaign and (2) paid Fred Meyer $350 for a page in the coupon book. *Id.* at 346. These allowances were not "made available to wholesalers who purchase from the supplier and resell to the direct-buying retailer's [Fred Meyer's] competitors." *Id.* at 347. The Court held that "[Fred] Meyer's retail competitors, rather than the two wholesalers, were competing customers under the statute." *Id.* at 348.

The Supreme Court reached its holding by starting with the premise that "on the facts of this case, § 2(d) reaches only discrimination between customers competing for resales at the same functional level and, therefore, does not mandate proportional equality between [Fred] Meyer and the two wholesalers." *Id.* at 348-49. After reviewing the legislative history of § 2(d), the Court found that the promotional allowances were forms of indirect price discrimination because smaller retailers could not shift their advertising costs as the larger retailers could by inducing the suppliers to provide allowances. "Congress chose to deter such indirect price discrimination by prohibiting the granting of sales promotional allowances to one customer unless accorded on proportionally equal terms to all competing customers." *Id.* at 352.

The Court defined "customers" to include those "retailers who buy through wholesalers and compete with a direct buyer in the resale of the supplier's product." *Id.* at 354. The Court analyzed the meaning of "competition" as found in § 2(d)

and concluded that Congress intended the term to cover competition "between buyers who competed in resales of the supplier's products." *Id.* at 356. Therefore, the Court concluded that "the most reasonable construction of § 2(d) is one which places on the supplier the responsibility for making promotional allowances available to those [retailers] who compete directly with the favored buyer." *Id.* at 357. In light of the Commission's argument that it would create a huge burden on manufacturers to have to bypass wholesalers and provide allowances to all of their retailers, the Court seemed to narrow its holding: "We hold only that, when a supplier gives allowances to a direct- buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales." *Id.* at 358.

The Supreme Court in *Fred Meyer* carefully limited its decision to the section 2(d) context, and the Court has not subsequently extended it to the section 2(a) context.[14]

14. It is true that in *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969), the Supreme Court, in dealing with an issue involving section 2(a), relied on *Fred Meyer* for the general proposition that the word "customer" in § 2(a) as well as § 2(d) should not be read to allow avoidance of the Act's purposes "by the simple expedient of adding an additional link to the distribution chain." 395 U.S. at 647-48. However, the issue in *Perkins* was the *extent of damages* where the supplier discriminated among direct purchasers, and the Supreme Court held that damages could include those suffered as a result of the favored purchaser passing on its savings down the line to third and fourth level purchasers. The holding, dealing as it did with the scope of relief, did not extend the *Fred Meyer* analysis to find a violation of section 2(a) in the first place on the basis of price discriminations against truly indirect purchasers who merely can be said to compete with favored direct purchasers.

It makes sense not to extend the *Fred Meyer* analysis to section 2(a), since the focus of 2(a) is the discrimination in the price to the purchasers, not a discrimination in helping purchasers sell to others.[15] Some courts have explicitly refused to extend the *Fred Meyer* analysis to section 2(a) cases, because to do so would arguably require vertical price maintenance in violation of the Sherman Antitrust Act. *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1026 & n. 8 (2d Cir.1976); *see also The Iams Co. v. Falduti*, 974 F.Supp. 1263, 1271-72 (E.D.Mo.1997). *But see Diehl & Sons v. International Harvester Co.*, 445 F.Supp. 282, 286-87 (E.D.N.Y.1978) (distinguishing *FLM Collision Parts*); *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*, 467 F.Supp. 1016, 1019-20 (holding *Fred Meyer* rationale applies equally to sections 2(a) and 2(d)).

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15. It is true that some cases state that "purchaser" in section 2(a) should be interpreted the same as "customer" in section 2(d). *American News Co. v. FTC*, 300 F.2d 104, 109 (2d Cir.1962); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 977 (6th Cir.1974) (dictum). However, these cases did not hold that a *Fred Meyer* analysis should be extended to section 2(a) claims. *American News* held in effect that "customer" in section 2(d) should be interpreted at least as broadly as "purchaser" in section 2(a). For the reasons stated in the text, the reverse is not true, and *American News* did not reach that issue. See the Second Circuit's later opinion in *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1026 n. 8 (2d Cir.1976) ("It is true that in some instances the word 'customer' in § 2(d) and the word 'purchaser' in § 2(a), are to be given the same meaning, *see, e.g., American News* . . . , but the Supreme Court limited its holding in *Fred Meyer, Inc.* . . . to § 2(d) cases"). This court's dictum in *Brewer* also dealt with a very distinct issue from the one resolved in *Fred Meyer:* whether a subsidiary could be considered a purchaser or customer under either provision of the Act.

Moreover, this court's decision in *Barnosky Oils* implicitly rejected the applicability of the *Fred Meyer* approach to section 2(a) claims. In *Barnosky Oils*, a supplier (Union) was alleged to have price discriminated in favor of direct purchasing dealers over dealers who purchased through wholesalers ("Union jobbers" such as Barnosky). This court rejected the Robinson-Patman § 2(a) claim because a party alleging price discrimination under Robinson-Patman "must prove that the same seller charged different prices to different purchasers." 665 F.2d at 83. Because the dealers who purchased through Barnosky did not purchase directly from Union, and Union did not control the sale between Barnosky and its purchasers, there was no § 2(a) violation by Union. If the *Fred Meyer* analysis had been applied, Barnosky would not have had to show that Union controlled the sale between Barnosky and its purchasers, but only that Barnosky's purchasers were in competition with the dealers who bought directly from Union. The absence of such an analysis in *Barnosky Oils* strongly suggests that the *Fred Meyer* analysis is not applicable to § 2(a) claims.

The vendors' § 2(a) claims should therefore be analyzed under *Barnosky Oils*. Under this court's holding in that case, vendors can only bring § 2(a) claims if vendors can show that Philip Morris controlled the sale by wholesalers to the vendors. While vendors argue on appeal that Philip Morris controlled the prices charged by wholesalers to convenience stores (an issue dealt with below), they make no such argument with respect to their own purchases from wholesalers, and the record does not support such control. In the present case, there is no evidence cited by either party or the district court that the convenience stores buy directly

from Philip Morris. The indirect purchaser doctrine, recognized by many courts to permit § 2(a) claims to go forward where there is such control, accordingly does not apply in this case.[16] As we said in *Barnosky Oils,* "[t]he purpose of the indirect [purchaser] doctrine is to prevent a manufacturer from insulating itself from Robinson-Patman liability by using a 'dummy' wholesaler to make sales at terms actually controlled by the manufacturer." 665 F.2d at 84. Absent any indication in the record that Philip Morris "actually controlled" the terms of sale by wholesalers to vendors, *Barnosky Oils* requires us to affirm the district court's summary judgment regarding section 2(a) claims brought by vendors who purchase through wholesalers. *See also Pierce v. Commercial Warehouse,* 876 F.2d 86, 87 (11th Cir.1989); *Hiram Walker, Inc. v. A & S Tropical, Inc.,* 407 F.2d 4, 7-8 (5th Cir.1969).

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16. The doctrine has been explained by the Seventh Circuit:

> If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. If the seller controls the sale, he is responsible for the discrimination in the sale price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition.

Purolator Products, Inc. v. FTC, 352 F.2d 874, 883 (7th Cir.1965).

With respect to vendors' section 2(d) and (e) claims, on the other hand, the *Barnosky Oils* requirement (that plaintiffs either purchase directly from the supplier or have the terms of plaintiffs' purchase from wholesalers be controlled by the supplier) is arguably not applicable because of the Supreme Court's analysis in *Fred Meyer.*[17] *Fred Meyer* held that a supplier could violate § 2(d) by discriminating against indirect buyers as long as the indirect buyers were *competitors of its direct buyers.* To apply the *Fred Meyer* analysis in this case, however, would require us to extend the holding of that case to situations where there is alleged discrimination against indirect buying competitors of the supplier's *indirect* buyers. In *Fred Meyer,* the *favored* purchasers (buyers) were *direct* purchasers. As Philip Morris points out on appeal, vendors have cited no cases in which neither the favored nor the disfavored buyers were direct purchasers from the allegedly discriminating supplier. It can be assumed, as vendors argue, however, that if the favored buyer met the requirements of the indirect purchaser doctrine, the *Fred Meyer* analysis would permit a section 2(d) or (e) claim.[18]

17. *Fred Meyer* was an FTC enforcement action, as opposed to a private party case. Philip Morris argues that *Fred Meyer* thus did not address statutory standing to bring a private suit. Regardless, the Court did define "customer" and there is no reason why this definition could not also apply to a private party action under the Act.

18. In other words, a supplier could not discriminate against the *competitor of a favored indirect purchaser* in the provision of services if the supplier so controlled the terms of the sale by the wholesaler to the favored indirect purchaser, that the favored indirect purchaser should be considered a favored *direct* purchaser.

On this assumption, it is necessary for us to examine whether there was such control by Philip Morris of the sales by wholesalers *to the convenience stores.*

Vendors argue that Philip Morris controls the resale of its products by convenience stores. According to vendors, Philip Morris does this by: 1) controlling the price of cigarettes by requiring stores that participate in the promotional programs to pass the discounts along to customers, 2) having its field representatives solicit stores to participate in the promotional programs, 3) other interactions between Philip Morris's field representatives and the convenience stores such as oversight of the programs, 4) reserving the right to cancel the program if a particular store does not comply with the contract, and 5) requiring the convenience stores to provide Philip Morris with reports of sales.

Darrell Moody, Territory Sales Manager at Philip Morris, testified that he provides the stores with a Retailer Understanding Form that the stores fill out. The form contains the store's name, the brands on sale, and "the amount for Philip Morris per each price off, the specific pieces of point of sale and the specific placement thereof." When the stores return the forms to Moody, he verifies the amount sold by the stores with the wholesaler invoices. The wholesaler invoices are attached to the form before it is sent to Philip Morris's office. There is a separate form for noncompliance with the promotional program contract. Moody testified that he visits the stores and may prepare a noncompliance form at the time he observes noncompliance. If a noncompliance form is filled out, it results in nonpayment by Philip Morris

to the store for that month and could even lead to termination of the contract.

Craig Johnson, Senior Vice President of Sales at Philip Morris, testified that Philip Morris pays the convenience stores for promotional expenses and that the promotions are passed to the consumer. Roy Anise, Vice President for Market Information and Planning at Philip Morris, testified that some of the larger convenience stores provide Philip Morris with monthly reports, detailing the amount of sales of Philip Morris's products and the stores' overall sales.

It appears from this evidence that Philip Morris has some control over the resale of its products by the convenience stores. Such control is, however, not sufficient to bring this case within the *Fred Meyer* analysis. While Philip Morris may have required the amount of discounts, it did not set the underlying prices for sale by the wholesalers, nor could the wholesalers be considered "dummy" companies. It would therefore be too great an extension of *Fred Meyer* to find that the competitors (vendors) of indirect purchasers like convenience stores are competing "customers" or "purchasers" for purposes of sections 2(d) and (e). In *Fred Meyer* the Supreme Court reasoned that "customer" should be defined "to include retailers who purchase through wholesalers and compete with direct buyers in resales" because

> a narrower reading of § 2(d) would lead to the following anomalous result. On the one hand, *direct-buying retailers* like Meyer, who resell large quantities of their supplier's products and therefore find it feasible to undertake the traditional wholesaling functions for themselves,

> would be protected by the provision from the granting of discriminatory promotional allowances to their direct-buying competitors. On the other hand, smaller retailers whose only access to suppliers is through independent wholesalers would not be entitled to this protection. Such a result would be diametrically opposed to Congress' clearly stated intent to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination. If we were to read "customer" as excluding retailers who buy through wholesalers and *compete with direct buyers,* we would frustrate the purpose of § 2(d).

390 U.S. at 352 (emphasis added). This policy does not apply where the favored purchaser buys indirectly from a wholesaler on terms that are not controlled by the allegedly discriminating supplier. Such buyers are inherently not the customers who "undertake the wholesaling function for themselves."

A determination that the *Fred Meyer* analysis should not be extended to competitors of truly indirect purchasers is supported, moreover, by a recognition that, unlike in *Fred Meyer,* the circumstances of this case do not reflect the underlying concern that motivated the passage of the Robinson- Patman Act in the first place.[19] Fred Meyer *was*

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19. As the Supreme Court explained in *FTC v. Morton Salt Co.,* 334 U.S. 37 (1948):

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to

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the large retailer who was taking advantage of smaller retailers who bought through wholesalers. The instant case, in contrast, involves alleged discrimination among different classes of indirect purchasers, not discrimination in favor of large direct- buying chain stores against small local stores. There is thus no reason to expand the *Fred Meyer* analysis in this case to permit statutory standing on behalf of competitors of indirect purchasers, at least where the supplier, Philip Morris in this case, does not control the sales of the wholesalers so extensively as to imply a circumvention of the policies of the Act.

4.

The district court's dismissal of plaintiff vendors who are not themselves purchasers from Philip Morris should therefore be affirmed because (1) they do not themselves buy directly from Philip Morris and their own purchases from wholesalers are not controlled by Philip Morris, and (2) with respect to section 2(d) and (e) claims, they cannot be considered customers under a *Fred Meyer* analysis because,

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> be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

Id. at 43.

although they compete with allegedly favored purchasers, the favored purchasers are not direct buying purchasers sufficiently analogous to the large retail chains that Congress was concerned about in passing the Robinson-Patman Act. The district court accepted that the remaining two vendors that purchase part of their inventory directly from Philip Morris do have standing under the Act, and this is not challenged on appeal.[20] Therefore, it is still necessary to determine whether these vendors were in competition with the convenience stores.

C. *Competition*

The district court granted summary judgment in the alternative due to vendors' failure to prove that their vending machines were in competition with the convenience stores. Under sections 2(a), 2(d) and 2(e), the complaining party must be in competition with the favored party.[21] FTC Guidelines, 16 C.F.R. § 240.2(a), (b);[22] *Hovenkamp* ¶ 2333a.

20. These two vendors are Penn Triple S trading as Penn Vending Company, and C.I.C. Corporation.

21. In addition, vendors and convenience stores must operate at the "same functional level." *Abbott Labs. v. Portland Retail Druggists Ass'n,* 425 U.S. 1, 12 (1976) (quoting *FTC v. Sun Oil Co.,* 371 U.S. 505, 520 (1963) (internal quotation marks omitted)). Neither party addresses this requirement, but we find that vendors and convenience stores do operate at the same functional level—resale of the products.

22. The FTC has published guidelines for compliance with sections 2(d) and 2(e). 16 C.F.R. § 240.1 et seq. Although, these

(Cont'd)

Appendix A

16 C.F.R. § 240.5 defines "competing customers" as "all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary." Despite Philip Morris's argument that vendors failed to present sufficient evidence of competition, we conclude that vendors did produce sufficient evidence to create a genuine issue of fact as to whether competition exists between the convenience stores and the vending machines.

Vendors argue that the district court erred by requiring them to provide a cross-price elasticity study to show competition.[23] A Robinson-Patman plaintiff does not have to present, however, a cross- elasticity study to show that

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guidelines do not have the force of law, *see* 16 C.F.R. § 240.1, they are helpful in applying the Act. The FTC is "charged with the day-to-day administration of the Act" and its rulings should be given deference. *Fred Meyer,* 390 U.S. at 355; *see also* 15 U.S.C. § 45 (FTC given power to prevent unfair competition).

23. Cross-elasticity of demand "measures the sensitivity of purchase of one good to change in the price of *another good.*" David N. Hyman, *Microeconomics* 144 (4th ed.1997). Mr. Hyman writes that "[c]ross- elasticity of demand may be positive or negative. A positive cross- elasticity of demand implies that the two goods are substitutes. Whenever the price of one good changes, other things being equal, the demand for the other moves in the same direction." *Id.* The higher the value of cross- elasticities, the greater the substitutability of the products. *Id.* at 145. If the value is zero then the products are unrelated to one another, such as typewriters and ice cream. *Id.*

competition exists between it and the favored purchaser. Although such a study would be helpful, competition can be shown in other ways, and in the present case, vendors presented evidence that created a genuine issue of material fact as to whether they were in competition with the convenience stores.

Vendors presented the testimony of Dr. Newbern and Professor Fanara. Dr. Newbern conducted a study of adult smokers ("Newbern study") and Professor Fanara analyzed that study. Dr. Newbern surveyed, in three cities, 315 adult smokers who patronize bars that have vending machines. The Newbern study showed that, of the factors that influence the purchase of cigarettes from convenience-type stores, easy access was the most given response at 40.2% overall. The second most favored reason was that the price is lower than vending machines, 26.4%. As for purchases from convenience stores, 90.7% said they had recently purchased from a convenience store. The next question asked, "Where was the location of the store in relation to this establishment?" Fifty-seven percent said that the convenience store was more than three blocks from the bar. Overall, 55.4% of participants were aware of price promotions for Philip Morris cigarettes, and 59.1% had at some point purchased cigarettes because of a special price or quantity promotion. More than half (50.5%) of the participants stated that price influenced where they purchased cigarettes. The price difference between vending machines and stores that would most influence the participants (44.4%) to buy from a store instead of a vending machine was between fifty cents and one dollar. Thirty- five percent said that they would be influenced by a difference of more than one dollar. Finally, the survey asked about vending

machine use. Almost all participants (91.9%) had at some time purchased from a vending machine: 71.2% within the past six months, 10.9% between six months and a year, and 17.9% over a year ago.

Professor Fanara analyzed this data and also reviewed the testimony of several expert witnesses. He found: Among the individuals surveyed 91.9% stated that they had purchased cigarettes from a vending machine, and 71.2% stated that they had purchased cigarettes from a vending machine within less than six months. The results of questions five, six, and seven in Table 4 of the survey taken in light of economic theory, provide substantial support for competition at the same functional level, or for the same consumer dollar.[24]

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24. Those questions and responses were:

Question 5: Have you recently purchased cigarettes from a convenience store? Overall affirmative response: 90.7%.

Question 6: Where was the location of the store in relation to this establishment? Within one block: 23.9%; within three blocks: 18.7%; more than three blocks: 57.4%.

Question 7: At which store did you make your purchase? Gas station/Mini- Mart: 41.8%; 7-11 Convenience Store: 20.6%; drug store: 3.9%; tobacco store: 2.5%; grocery store: 11.3%; other: 19.9%.

Appendix A

The district court held that "[t]he data collected by Dr. Newbern, which Professor Fanara relies on in formulating his opinion, does not reflect whether smokers switched from using vending machines to purchasing their cigarettes solely at convenience stores in response to the defendant's promotional programs."[25] J.A. 121. But vendors do not need to show that smokers switched from vending machines to convenience store purchases on the basis of the promotional programs. Such a requirement goes to injury, and the element at issue on this appeal is the existence, not the amount of damage to, competition. Nor must vendors show, as the district court appeared to require, "at what point an increase in the price of [vending machine] cigarettes will compel patrons of an establishment to forego the convenience of purchasing cigarettes from a vending machine on site and cause them to leave this site in order to purchase their cigarettes elsewhere."

The Newbern study survey showed that smokers purchase cigarettes both from convenience stores and vending machines. Even the district court found that the survey results showed that "some people purchase cigarettes from both" convenience stores and vending machines. J.A. 121. Also, since price is a consideration, the inference may be drawn that if the price of vending machines goes beyond a certain point (for example a difference of 50 cents to over $1.00

25. The district court reached this conclusion and then found that there was no factual basis for vendors' expert testimony, apparently referring to Dr. Fanara. The court did not appear to make a similar finding with respect to Dr. Newbern's study and, in fact, concluded that the motion to strike Dr. Newbern's testimony was moot.

would cause 79.4% to buy at a store rather than a machine), then vending machines will lose business to convenience stores selling for less.

In addition to the expert testimony, several vendors testified that they were forced to remove their vending machines due to lost sales after customers kept leaving the premises to buy cigarettes at nearby convenience stores.[26] Mike Savar, principal of Penn Vending Company, a remaining plaintiff, testified that he received numerous phone calls from location owners complaining about customers leaving to buy cigarettes elsewhere. At one location, he lost the account after receiving such a complaint.

Assuming that vendors' testimony is admissible, this evidence in addition to the Newbern study presents a question of material fact on the issue of whether competition exists. As *Thurman Industries v. Pay 'N Pak Stores, Inc.* noted,

> For antitrust purposes, defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to

26. Philip Morris asserts that the district court may not rely on the hearsay statements related by vendors about customers leaving establishments to buy cigarettes elsewhere to prove causation. *See e.g., Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, 63 F.3d 1267 (district court improperly considered anecdotal testimony that customers did not deal with manufacturers because the evidence was admitted under Rule 803(3) but was used to prove the truth of the facts asserted). On remand, the district court may decide whether vendors' anecdotal testimony is admissible as a basis to show that vendors compete with convenience stores.

> deprive each other of significant levels of business. This definitional process is a factual inquiry for the jury; the court may not weigh evidence or judge witness credibility.

875 F.2d 1369, 1374 (9th Cir.1989) (citations omitted). In contrast to the instant case, in *Godfrey v. Pulitzer Publishing Co.*, the Eighth Circuit held that summary judgment was proper because the disfavored dealers did nothing more than cite one instance of losing business to support the required showing of competition. Furthermore, the expert did "not provide[] any tangible evidence, numerical or anecdotal, to show that the branch dealers in fact compete[d]." 276 F.3d 405, 412 (8th Cir.2002). The disfavored dealers' conclusory statements that competition existed was insufficient. *Id.* "In order to survive a motion for summary judgment, the non-moving party must be able to show 'sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy.'" *Id.* (quoting *Moody v. St. Charles County,* 23 F.3d 1410, 1412 (8th Cir.1994)). Here vendors presented more than a mere basis for speculation or conjecture.

Vendors also submitted, in response to an interrogatory, a list of machines by zip code that assertedly compete with convenience stores listed by Philip Morris for the same zip code areas.

In the present case, viewing vendors' proffers in combination, there was a sufficient showing to avoid summary judgment that Philip Morris products sold in convenience stores competed with the same products sold in

vending machines. We therefore reverse the grant of summary judgment as to the remaining plaintiffs.[27]

D. *Other arguments*

Philip Morris argues that we may affirm on the alternative ground that vendors have not shown causation of competitive injury. This is a different ground from that relied upon by the district court. Competition may exist, of course, even though there has been no injury to that competition. In view of the fact-intensive nature of the injury issue, we decline to

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27. In addition to Philip Morris's motion for summary judgment, the district court also had before it Philip Morris's motion to strike the expert testimony of Dr. Newbern and Professor Fanara. Philip Morris argues that vendors' expert testimony did not meet the requirements of Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and their progeny. The district court found insufficient evidence to show competition without having to reach the question whether Professor Fanara and Dr. Newbern's testimony should have been stricken. On appeal, Philip Morris argues that this court may address this issue because it is an alternative ground for summary judgment.

Rule 702 provides that an expert may testify to his/her opinion if (1) it is based upon "sufficient facts or data," (2) it is "the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed.R.Evid. 702. A trial judge must determine whether the expert testimony is relevant and reliable. *Daubert*, 509 U.S. at 589. Given the gatekeeping function of the district court to determine the reliability and relevance of expert testimony, *Kumho Tire Co.*, 526 U.S. at 142-43, the district court should decide on remand whether to grant this motion.

resolve it for the first time on appeal. The issue is more properly considered by the district court upon remand. Vendors also challenge on appeal the district court's denial on mootness grounds of a motion by vendors for production of documents. In view of our present holding, the district court may consider a renewed motion to that effect on remand. We express no view on whether the motion should be granted.

Appendix A

OPINION

KAREN NELSON MOORE, Circuit Judge, majority in part and concurring in part. While I agree with Judge Rogers's reasoning in Part II.C. of his opinion, with respect to the question of whether the convenience stores ("stores") are genuinely in competition with the vending-machine vendors ("vendors"), I do not agree that any of the plaintiff-vendors lack statutory standing. I therefore disagree with Part II.B., and write separately to express my conclusion that all plaintiffs have standing to challenge what are best considered violations of § 2(d) and (e) of the Act.

Plaintiff-vendors in this case allege violations of the Robinson-Patman Act, 15 U.S.C. § 13(a), (d), and (e) ("Act"). The district court granted Philip Morris's motion for summary judgment partially on the basis that the majority of the plaintiffs did not have statutory standing, as they did not purchase directly from Philip Morris. I believe that this determination was in error, and I would therefore reverse the district court's judgment in its entirety.

I agree with Judge Rogers that it is best to consider separately standing under § 2(a), prohibiting discriminatory pricing, and under § 2(d) and (e), prohibiting discriminatory provision of or reimbursement for promotional services. Under either statutory provision, however, I believe plaintiffs have standing. I would therefore allow all of the plaintiffs to proceed on all of their claims.

Appendix A

I. The Vendors' Claims are Best Analyzed as § 2(d) Claims

[15] Section 2(a) of the Act makes price discrimination, or the contemporaneous sale of goods of like quality to two different purchasers for two different prices, illegal. In addition to "direct" price discrimination, courts have held that § 2(a) also extends to "indirect" price discrimination, where identical price structures are made disparate through, for example, the granting of rebates, the payment of shipping costs, or the provision of free goods. *See Corn Prods. Refining Co. v. FTC*, 324 U.S. 726, 732 (1945); *National Dairy Prods. Corp. v. FTC*, 412 F.2d 605, 608, 611-12 (7th Cir.1969); *see also* 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2322 (1999). Subsections 2(d) and (e), prohibiting the payment of "anything of value" in consideration for services rendered or facilities furnished in the resale of goods or the provision of those services or facilities themselves, also cover the provision of free goods to a reseller. 15 U.S.C. § 13(d), (e); *see* HOVENKAMP, *supra*, ¶ 2322b. There is therefore some overlap between § 2(a) and § 2(d) and (e), where a supplier provides free goods or provides rebates or other payment for particular services. Here, three of Philip Morris's promotional programs are under attack as Robinson-Patman violations: its price promotions, where the stores sell cigarette packs at a discount and are refunded the amount of the discount by Philip Morris; its product promotions, where the stores sell a certain number of packs for the price of a lesser number of packs, and are provided the extra pack or packs by Philip Morris (through product rebates); and its incentive promotions, where gifts are supplied to the stores

to give to the ultimate retail consumer.[1] The product and price promotions, which consist of payments from Philip Morris to the stores, either in the form of a product rebate or a price rebate, seem potential § 2(a) violations as well as potential § 2(d) and (e) violations. Because each of these programs aims at providing benefit to the retail consumer, and results only in increased sales volume for the stores, rather than greater profit on each individual sale through a decreased wholesale price, I believe these programs are each best considered as § 2(d) and (e) violations. Philip Morris provides the free goods to the stores with the requirement that they pass those goods *on to the ultimate retail customer;* Philip Morris does not provide the free goods directly *to the stores* to dispose of as they wish. Courts that find a § 2(a) violation in the provision of free goods do so where free goods are provided to a purchaser who is then free to sell each good at any price she wishes. There the provision of free goods makes the "actual price" paid by the retailer for each individual good lower. *See National Dairy Prods.*, 412 F.2d at 608. Here, however, the profit the convenience stores receive remains steady for each pack of cigarettes purchased, as the benefit of the product rebate from Philip Morris is always offset by the cigarettes given away. Philip Morris's decision to provide free goods does not result in an overall increase in the profit received on each individual purchased good. *See id.* I believe that the promotional programs are therefore best analyzed

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1. In addition, plaintiff-vendors complain of additional promotional fees, racks, fixtures, and signage made available by Philip Morris to their store competitors. Plaintiffs' Brief at 31. To the extent these programs reflect a Robinson-Patman violation, they are violative of § 2(d) and (e) as the provision of or payment for promotional and advertising programs.

under § 2(d) and (e). *Cf. R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2000-1 Trade Cas. (CCH) ¶ 72,799 (N.D.Ill.1999) (discussing interaction of § 2(a) and (d) and (e) vis-à-vis provision of free goods).

II. Under the Rule of *Fred Meyer*, Plaintiffs are Philip Morris's "Customers" for the Purposes of § 2(d) and (e)

[16] Judge Rogers argues that *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), can be distinguished from the present case on the basis that the favored customers in this case, the stores, do not purchase directly from Philip Morris. However, *Fred Meyer's* holding that the word "customer" in § 2(d) encompassed customers who purchased through a wholesaler, as well as direct-buying customers, should be applied to every use of the word "customer" in § 2(d) and not merely the third use thereof.[2] Section 2(d) states:

> Payment for services or facilities for processing or sale. It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a

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2. While the product promotions offered by Philip Morris and the provision of free goods by Philip Morris may be violations of § 2(e) rather than § 2(d), the statutory sections have long been considered as a cohesive whole, and the meaning of "purchaser" in § 2(e) as coterminous with that of "customer" in § 2(d). *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir.1973), *cert. denied*, 417 U.S. 911 (1974); *see* Hovenkamp, *supra*, ¶ 2363b, at 241.

> customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

In *Fred Meyer,* the Court held that § 2(d)'s reference to "customers competing" with the favored customer included retailers who purchased a supplier's goods through a wholesaler where the favored customer (respondent Fred Meyer) purchased directly from the supplier. In that case, respondent grocery store's suppliers paid Fred Meyer in cash or in kind to feature their products in an annual coupon book without offering the same promotions to Fred Meyer's competitors, retailers who purchased through a wholesaler. *Id.* at 344-45. In broadly defining "customers competing," the Court emphasized a functional analysis of the Act's terms, reasoning that "the proscription of § 2(d) reaches the kind of discriminatory promotional allowances" at issue in the case, but concluding that "Meyer's retail competitors, rather than the two wholesalers, were competing customers under the statute." *Id.* at 348. The Court specifically rejected the "narrow definition of 'customer' " offered by Fred Meyer, "which becomes wholly untenable when viewed in light of the central purpose of § 2(d) and the economic realities with which its framers were concerned." *Id.* at 349.

The usual presumption that "the same words used twice in the same act have the same meaning," 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 193 (6th ed.2000), operates with even greater force here, where the same word is used twice within the same sentence within the same subsection of the Act. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995). Given the clear holding in *Fred Meyer* that the third use of the word "customer" in § 2(d) includes customers who purchase through a wholesaler, it would take an extremely strong showing of Congressional intent to defeat the conclusion that the first use of the word "customer" in the same sentence carries the same meaning. While the functional analysis used in *Fred Meyer* may not weigh as heavily in favor of plaintiff-vendors' claims here as it did in favor of the FTC's argument in that case, it provides nothing near the showing necessary to establish that the meaning of "customer" in § 2(d) is not uniform.

In *Fred Meyer,* the Supreme Court based its interpretation of the Robinson-Patman Act on the functional reasons behind passage of the Act. Specifically, the Court reasoned that Congress had intended to protect smaller businesses, who could not afford to purchase directly from suppliers, against the concessions larger chains would be able to force as a result of their greater market power and direct dealings with the supplier. *Fred Meyer,* 390 U.S. at 350-53. Here, of course, the favored purchasers (the convenience stores) are not large chain stores buying directly from the supplier, but stores purchasing instead through a wholesaler. This intermediary cannot serve to distinguish the factual situation from that in *Fred Meyer* where, as here, the allegedly discriminatory supplier (Philip Morris) and the favored purchasers (the

convenience stores) have direct dealings that are the allegedly unlawful behavior. That is, the functional difference between a direct purchaser and one who purchases through a wholesaler is only important where the passage through an intermediary insulates the supplier from its retailers, such as in typical price discrimination claims where the wholesaler, not the supplier, sets the actual price for the retailer. Here, the complained-of behavior consists only of promotional services rendered by Philip Morris directly to the favored stores, without any involvement of the wholesaler. Each of these promotions involves sustained contact and exchange of goods, services, and cash between Philip Morris and the stores. While the wholesaler sets the price of cigarettes that the store purchases, discrimination in that wholesaler-set price is not at issue in this case; the price discount provided by the promotions is. Philip Morris sets the terms of each promotion, monitors compliance with that promotion, and provides the benefit of each promotion directly to the convenience stores. *See* Judge Rogers's op. at 5; Plaintiffs' Brief at 5-7; Defendant's Brief at 7-8.

Given the strong presumption in favor of unitary meaning of terms in the same statutory provision, and the Supreme Court's decision in *Fred Meyer,* where the complained-of services are provided directly to the retailer by the supplier, I conclude that "customer" includes those favored customers (the convenience stores in this case) who purchase through a wholesaler, and accordingly conclude that all plaintiff-vendors have statutory standing to challenge these promotions as violations of § 2(d) and (e) of the Act.

III. If Plaintiffs' Claims are Considered Under § 2(a), the Proper Application of the Indirect-Purchaser Doctrine Would Confer Statutory Standing on All Plaintiffs

Although the promotional programs at issue are best considered as alleged violations of § 2(d) and (e) for the reasons noted above, even if they are considered as alleged violations of § 2(a) of the Act, all vendors still have standing.

The meaning of "purchaser" in § 2(a) has been held to be the same as that of "customer" in § 2(d) and "purchaser" in § 2(e). *See American News Co. v. FTC,* 300 F.2d 104, 109 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962). That same court, however, was doubtful when faced with the applicability of *Fred Meyer* to § 2(a), expressing concern over requiring vertical price maintenance that might run afoul of the Sherman Act. *See FLM Collision Parts, Inc. v. Ford Motor Co.,* 543 F.2d 1019, 1026 & n. 8 (2d Cir.1976), *cert. denied,* 429 U.S. 1097 (1977). At least one other court has rejected the application, choosing instead to apply the "indirect buyer" rule of § 2(a) that predated *Fred Meyer. See Iams Co. v. Falduti,* 974 F.Supp. 1263, 1271-72 (E.D.Mo.1997). Other courts, however, have chosen to apply *Fred Meyer* to § 2(a). *See White Indus., Inc. v. Cessna Aircraft Co.,* 657 F.Supp. 687, 701-03 (W.D.Mo.1986), *aff'd,* 845 F.2d 1497 (8th Cir.), *cert. denied,* 488 U.S. 856 (1988); *Julius Nasso Concrete Corp. v. DIC Concrete Corp.,* 467 F.Supp. 1016, 1019-20 (S.D.N.Y.1979);[3] *see also Checker Motors Corp. v. Chrysler*

3. *Julius Nasso* inexplicably fails to distinguish *FLM Collision Parts;* it is worth noting, however, that *FLM* dealt with price (Cont'd)

Corp., 283 F.Supp. 876, 887 (S.D.N.Y.1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969) (treating *Fred Meyer* as a particular application of indirect-purchaser rule). Appellee Philip Morris argues and Judge Rogers accepts that this court's case *Barnosky Oils, Inc. v. Union Oil Co. of California*, 665 F.2d 74 (6th Cir.1981), forecloses the application of *Fred Meyer* to § 2(a). *Barnosky* dealt with a price- discrimination claim by an independent jobber (Barnosky), who claimed that the supplier's (Union Oil) sales to its own branded retail outlets at a lower price than Barnosky could afford to charge to its retail customers violated § 2(a). *Id.* at 83. In rejecting that claim, this court relied exclusively on the indirect-purchaser doctrine and did not cite *Fred Meyer* in doing so. While I doubt that this serves to preclude our application of *Fred Meyer* to the potential § 2(a) violations in this case, and *Barnosky* is in any event distinguishable as the more typical case where the supplier

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differentiation *intra*-purchaser—each customer of Ford was charged a different price based on the identity of the ultimate purchaser, and FLM attempted to use *Fred Meyer* to argue that Ford was required to equalize the price ultimately charged to competing wholesalers. *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1026-27 (2d Cir.1976), *cert. denied*, 429 U.S. 1097 (1977). Ford sold its parts to its franchised dealers, charging them less when they resold the part to an independent auto repair shop than when they sold the part to an independent wholesaler such as FLM, effectively pricing FLM out of the wholesaling business. *Id.* at 1023-24. The key point for the *FLM* court was that Ford did not discriminate between different purchasers, but instead between its purchasers in one guise—that of retailer—and another—that of wholesaler. Ultimately, *FLM's* rejection of *Fred Meyer's* applicability to § 2(a) seems very much confined to the facts of that case. *Id.* at 1026.

exercises no control over the price or the discount offered to the purchaser through the wholesaler, I believe it is unnecessary to decide the question, because the indirect-purchaser doctrine adopted in *Barnosky* properly applies in this case.

The indirect-purchaser doctrine was adopted primarily to stop suppliers from setting up dummy wholesalers to evade the Act; in its simplest terms, the doctrine applies when the supplier of a product so closely controls the terms of that product's resale through a wholesaler that the supplier can be said to be the actual seller to the purchaser. HOVENKAMP, *supra*, ¶ 2311b; *see Purolator Prods., Inc. v. FTC*, 352 F.2d 874, 883 (7th Cir.1965), *cert. denied*, 389 U.S. 1045 (1968). In the usual § 2(a) claim, the complained-of price discrimination consists of prices set by the actual seller, whether a direct seller or a supplier in control of its wholesaler, that differ between one purchaser and another. The price and the discrimination constitute an integrated whole, and where retailers attempting to use the indirect-purchaser rule cannot establish that suppliers control the price set by the wholesaler, the suppliers are immune from discrimination claims. Plaintiffs attempting to assert themselves as indirect purchasers are usually the customers of a wholesaler, competing with direct-purchasing customers, and are hamstrung by their purchase from an intermediary that sets the price and therefore perpetrates the complained-of "discrimination."[4] Here, however, the complained-of price

4. *See, e.g., Barnosky Oils, Inc. v. Union Oil Co. of Cal.*, 665 F.2d 74 (6th Cir.1981). In that case, Union was actually selling to Barnosky at a lower price than to Union's retail outlets; Barnosky's

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discrimination is *not* the price set by the wholesaler, but the *discount* set directly by Philip Morris. Inasmuch as the provision of free goods constitutes a violation of § 2(a) as indirect price discrimination, the provision of free goods to certain retailers by Philip Morris is the § 2(a) violation—*not* the price set by the wholesaler. Therefore, the extension of that discount to certain retailers (the stores) and not to others (the vendors), where Philip Morris controls entirely the terms of that discount, constitutes price discrimination under the Act.

IV. Conclusion

Because I believe the district court erred in granting summary judgment to defendant with respect to the vendors who do not purchase directly from Philip Morris, I would reverse the judgment in its entirety and allow all plaintiffs to proceed on both Counts I and II.

(Cont'd)
claim on behalf of its retail customers was that the price wasn't "lower enough" to allow its customers to compete. Courts have consistently rejected attempts to use Robinson-Patman to preserve a particular level in a distribution system into perpetuity, *see Conoco Inc. v. Inman Oil Co.*, 774 F.2d 895, 904 (8th Cir.1985); *see also Barnosky*, 665 F.2d at 83- 84; *FLM Collision Parts*, 543 F.2d at 1025-26.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION DATED AUGUST 7, 2004

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-99-0099
Judge Higgins

JAMES A. LEWIS d/b/a B&H VENDORS, et al.

v.

PHILIP MORRIS INCORPORATED

MEMORANDUM

The Court has before it the defendant's motion (filed June 29, 2000; Docket Entry No. 170) for summary judgment and memorandum (Docket Entry No. 171) in support; and the plaintiffs' response (filed July 19, 2000; Docket Entry No. 196).

The Court has subject matter jurisdiction over the plaintiffs' claims under Sections 2(a), (d) & (e) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, Title 15, United States Code, Sections 13(a), (d) & (e), pursuant to Title 28, United States Code, Section 1337.

Appendix B

For the reasons set forth below, the Court shall grant the defendant's motion.

I.

The plaintiffs in this action are comprised of over 200 cigarette vending machine operators or "vendors"[1] and bring this lawsuit alleging that the defendant, Philip Morris Incorporated, violated Sections 2(a), (d) & (e) of the Robinson-Patman Act, Title 15, United States Code, Sections 7.3 (a), (d) & (e).[2] In Count One of their amended

1. By order (entered June 9, 1999; Docket Entry No. 117), the Court designated eleven parties to be trial plaintiffs: James A. Lewis d/b/a B&H Vendors; B&G Enterprises, Ltd.; Spartan Automatic Retailers, L.P.; Penn Vending Company; Eagle Coin Machine; All Brands Vending Co., Inc.; Belfiore Music & Cigarette Co.; Class A Vending; Melo-Tone Vending, Inc.; T. D. Rowe Corp. and C.I.C. Corporation. Spartan Automatic Retailers, claims were voluntarily dismissed with prejudiced. *See* order (entered December 1, 1999; Docket Entry No. 148).

2. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such

(Cont'd)

Appendix B

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discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

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complaint (filed March 17, 1999; Docket Entry No. 26), the plaintiffs allege that beginning in 1996, and continuing to the present, the defendant violated Sections 2(d) & (e) of the Robinson-Patman Act by paying promotional fees, by offering rebates and buy downs and by providing promotional

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Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d), provides:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e), provides:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

and advertising services to convenience stores, mini-marts and other competitors of the plaintiffs without offering these same services and promotions to the plaintiffs on proportionally equal terms. In Count Two, the plaintiffs allege that the defendant's program of offering rebates and buy downs to convenience stores, mini-marts and other competitors of the plaintiffs without making the same offers to the plaintiffs constitutes price discrimination in violation of Section 2(a) of the Robinson-Patman Act.

The defendant corporation sells its cigarettes in the United States to a limited number of direct-purchasing customers, most of whom are wholesalers. It also sells directly to a small number of retailers and vendors. The defendant's cigarettes are sold over the counter in such places as grocery stores, convenience stores, gas stations and other locations. Before November 1, 1998, the defendant had instituted a promotional program called the Plan MV. Under the plan, the defendant paid the vendors a fee for displaying its advertisement on their machines and for carrying some of the defendant's brands of cigarettes in a certain number of slots or columns in their vending machines. The Plan MV was effectively terminated on November 1, 1998.

In November, 1998, Philip Morris initiated promotional price allowances for convenience stores and other over-the-counter retailers participating in the defendant's promotional programs entitled Retail Leaders and Retail Masters.[3] Since the implementation of this promotion through the defendant's Retail Leaders and Retail Masters programs

3. A similar program entitled "Ranch Party '99" was also introduced by Philip Morris in either January or February, 1999.

in November, 1998, Philip Morris has initiated other promotions offering a variety of price promotional allowances to retailers on the condition that they reduce their regular price to adult smokers by at least the amount of the allowances. Retailers who do not fulfill the promotions' conditions by reducing their prices do not receive the allowances.

The defendant also offers the retailers product and incentive promotions. A product promotion provides a consumer with a Philip Morris product with a purchase, e.g., if a consumer buys two packs of cigarettes then the third pack is free. An incentive promotion provides a consumer with a free gift for purchases of Philip Morris cigarettes.

In December, 1998, Mark Levine and Larry Rosenquist, acting as representatives for some of the vendors, met with officials from Philip Morris in an attempt to persuade the defendant to reinstate the Plan MV. However, they were unsuccessful in their efforts.

The plaintiffs assert that on November 23, 1998, Philip Morris announced a price increase of 45¢ per pack/$4.50 per carton of cigarettes but also announced that the participants in its Retail Leaders and Retail Masters programs would receive a 4¢/$4.50 promotional allowance or rebate per pack/carton of cigarettes if the retailers reduced their price to at least the amount of the allowances or rebates. These promotional allowances and rebates were not offered to the plaintiffs. As a result, the plaintiffs allege that the amount of their lost sales has been financially devastating.

Appendix B

The defendant contends that eight of the ten plaintiffs do not purchase their cigarettes directly from it and that the other two plaintiffs only purchase a portion of their cigarettes directly from Philip Morris. Therefore, the defendant asserts that the plaintiffs do not have standing to seek relief under the Robinson/Patman Act regarding indirect purchases. The defendant also contends that the plaintiffs have not presented evidence to show that the defendant's promotional programs that are offered to retailers at the exclusion of the plaintiff vendors caused the decline in cigarette sales which the plaintiffs claim they suffered. Lastly, the defendant asserts that the plaintiffs have failed to present evidence showing that the plaintiffs' vending machines are in competition with the retail stores participating in the defendant's Retail Leaders and Retail Masters programs.

II.

As provided by Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202, 211 (1986). In its consideration of the evidence, the Court must view all facts and inferences to be drawn therefrom in the light most favorable to the non-moving party. *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1349 (6th Cir. 1991). In order to prevail on a summary judgment motion, the moving party bears the burden of proving the absence of a

genuine issue of material fact concerning an essential element of the opposing party's action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986); *Davidson & Jones Dev. Co.*, 921 F.2d at 1349; *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). An issue of material fact is one which, under the substantive law governing the issue, might affect the outcome of the suit. *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211.

In addition, a dispute about the material fact must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the non-moving party."[4] *Id.* at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211-12. Since the preponderance of the evidence standard is used in this determination, more than a mere scintilla of evidence in support of the plaintiff's position is required. *Id.* at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

Once a motion for summary judgment has been made, "the nonmoving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56 (e)." *Davidson & Jones Dev. Co.*, 921 F.2d at 1349. The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact.

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4. The Supreme Court further explained that a court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

Celotex, 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at 274; *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989). While the disputed issue does not have to be resolved conclusively in favor of the non-moving party to defeat summary judgment, "sufficient evidence supporting the claimed factual dispute" must be shown, thereby requiring resolution of the parties' differing versions of the truth by a jury or judge. *Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510, 91 L.Ed.2d at 212; *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569, 592 (1968).

III.

A. Standing

The defendant contends that the plaintiffs lack standing to assert a claim under the Robinson-Patman Act because they are not direct purchasers of Philip Morris. Specifically, the defendant alleges that since November, 1998, All Brands Vending, B&H Vendors, B&G Enterprises, Belfiore Music & Cigarette, Class A Vending, Eagle Coin Machine, Melo-Tone Vending and T. D. Rowe have not purchased cigarettes directly from Philip Morris. Appendix (filed June 29, 2000; Docket Entry No. 172), attachment thereto, Exhibit 7, affidavit of Barry Hopkins, ¶ 3. The defendant asserts that Penn Vending and C.I.C. are the only plaintiffs that have directly purchased cigarettes from Philip Morris since November, 1998. *Id.*, Affidavit of Barry Hopkins, ¶ 4. The defendant moves for summary judgment on the claims of the eight indirect-purchasing plaintiffs and partial summary judgment on the claims of Penn Vending and C.I.C. that are based upon the products that they indirectly purchased from Philip Morris.

Appendix B

In order to bring a claim under the Robinson-Patman Act, the plaintiffs must prove that they purchased directly from the defendant seller.[5] *Barnosky Oils, Inc. v. Union Oil Co. of Cal.*, 665 F.2d 74, 83 (6th Cir. 1981). In their complaint, the plaintiffs allege, "Defendant sells its cigarettes to wholesalers who in turn sell them to retailers such as plaintiffs' competitors. Defendant uses wholesalers to distribute and implement its promotional programs." Amended complaint (Docket Entry No. 26), ¶ 17. Although the plaintiffs state that they purchase the defendant's cigarettes from wholesalers, they contend that they meet the requirement of being direct purchasers of the defendant under the indirect purchaser doctrine.

In explaining the indirect purchaser doctrine, the United States Court of Appeals for the Seventh Circuit stated the following:

> To ensure fair competition among purchasers from the same seller, the Robinson-Patman Act amendments to the Clayton Act forbade sellers to make price discriminations between purchasers except when justified by economies to the seller. If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. If the seller

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5. The terms "purchaser" and "customer" in Sections 2(a), (d) and (e) under the Act are synonymous. *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 977 (6th Cir. 1974); *American News Co. v. FTC*, 300 F.2d 104, 109 (2nd Cir. 1962).

> controls the sale, he is responsible for the discrimination in the sale price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition.

Purolator Prod., Inc. v. FTC, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 758, 19 L.Ed.2d 837 (1968). "The purpose of the indirect doctrine is to prevent a manufacturer from insulating itself from Robinson-Patman liability by using a 'dummy' wholesaler to make sales at terms actually controlled by the manufacturer." *Barnosky*, 665 F.2d at 84. In applying the indirect purchaser doctrine in this circuit, the United States Court of Appeals for the Sixth Circuit stated that "the critical factor in determining its applicability is the degree of control exercised by the seller over its immediate buyer." *Id.* In *Purolator*, *supra*, the Federal Trade Commission listed several factors in determining whether a plaintiff qualified as an indirect purchaser. The Court recited the following:

> Where the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are fixed by the manufacturer or are subject to its approval, the predicate for a finding that the indirect purchaser is a purchaser from the manufacturer has been constructed. Other factors to be considered in arriving at the conclusion are instances of direct contact between the indirect

> purchaser and the manufacturer, such as direct negotiation of franchise agreements, direct solicitation of orders by the manufacturer's salesmen even though the orders are filled by the intermediary and the manufacturer looks to the intermediary for payment, direct negotiations for changes in price, direct policing of the indirect purchaser's resale prices, direct provision of advertising materials, and inspection by the manufacturer to insure that the indirect purchaser is fulfilling the terms of its agreement with the manufacturer's distributor or wholesaler.

Purolator, 352 F.2d at 881; *Iams Co. v. Falduti*, 974 F. Supp. 1263, 1270-71 (E.D. Mo. 1997).

The plaintiffs contend that Philip Morris controls the price of its cigarettes sold to consumers through its price promotional allowances and consumer rebates. The plaintiffs assert that through the Retail Leaders and Retail Masters Programs participating retailers are required to pass along discounts to the ultimate consumers, which directly affects the per pack retail price of Philip Morris cigarettes. The plaintiffs also allege that Philip Morris enforces its control over retail pricing by reserving the right to drop participating retailers from its promotional programs if they fail to pass rebates along to the consumer and that participating retailers are required to provide Philip Morris with detailed reports on a monthly basis, which includes exact customer sales and overall volume of sales. *See* response (Docket Entry No. 196), attachment thereto, appendix vol. II, deposition of Darrell Moody at 659-64 (discussing

circumstances under which a noncompliance form would be submitted due to a retailer's failure to meet its contractual requirements with Philip Morris and discussing the placement of signage and cigarette display racks); deposition of Roy Anise at 609-13 (discussing reports on the market share of cigarette brands in a retailer's store, the volume of retail sales expressed in cartons of cigarettes per week and the number of cigarette cartons purchased by the retailer from the wholesaler).

The defendant contends that there is no evidence in the record to indicate that Philip Morris "set or controlled [the] resale price," *Barnosky*, 665 F.2d at 84, or determined the terms of the sale by the wholesalers to the plaintiffs. In support of its contention, the defendant asserts that many plaintiffs have admitted that Philip Morris is not involved in the dealings between the plaintiffs and their suppliers. Barry Rosenberg of B&G stated that he was unaware if Philip Morris was involved in setting the terms of the prices of the distributor from which B&G purchases its cigarettes. Notice (filed May 5, 1999; Docket Entry No. 66) of filing copies of depositions, attachment thereto, deposition of Barry Rosenberg at 107. Mr. Rosenberg also stated that there was no one from Philip Morris with whom he had any personal contact. *Id.* Joseph Belfiore of Belfiore Music & Cigarette Co. stated that Philip Morris did not get involved in the negotiations between Belfiore and its wholesaler. Appendix (Docket Entry No. 172), attachment thereto, Exhibit 18, deposition of Joseph Belfiore at 123. Mark Levine of Melo-Tone stated that Philip Morris is not involved in the transactions between Melo-Tone and its supplier. Notice (filed May 17, 1999; Docket Entry No. 79) of filing of

depositions, attachment thereto, deposition of Mark Levine at 133. Randy Valentine of Class A Vending stated in his deposition that he was not aware of Philip Morris participating in negotiations between Class A Vending and its wholesaler. Appendix (Docket Entry No. 172), attachment thereto, Exhibit 38, deposition of Randy Valentine at 105.

In their response (Docket Entry No. 196) at 10-11, the plaintiffs cite to various testimony in support of their contention that Philip Morris controls the resale price of its cigarettes by participating retailers through its promotional programs. *See* response (Docket Entry No. 196), attachment thereto, appendix vol. II, deposition of Craig Johnson at 636-37, 641, 644 (discussing the requirements that retailers provide in order to receive payment from Philip Morris, such as providing volume sales reports, inventory of brands, advertising and proper placement and location of the defendant's cigarette brands); testimony of William Iler at preliminary injunction hearing at 743 (explaining incentive, product and price promotions); deposition of Darrell Moody, at 659-64 and deposition of Roy Anise at 609-13, *supra*. However, the plaintiffs fail to present any evidence showing that Philip Morris controls the transactions between the plaintiffs, i.e., the indirect purchasers, and their suppliers. Further, the plaintiffs have neither presented evidence nor alleged that Philip Morris owns any of the wholesalers which sell to the plaintiffs.

In describing the indirect purchaser doctrine, the Court stated, "If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all

practical, economic purposes dealing directly with the seller." *Purolator*, 352 F.2d at 883. The plaintiffs' citations focus on the effect that the defendant's promotional programs have on the retail prices of its cigarettes sold by the participating retailers and not on the degree of control that Philip Morris allegedly wields on the suppliers of the indirect-purchasing plaintiffs. In fact, the plaintiffs have failed to establish that Philip Morris exhibits any degree of control over the plaintiffs' immediate suppliers. As the Court stated in *Barnosky*, "The purpose of the indirect doctrine is to prevent a manufacturer from insulating itself from Robinson-Patman liability by using a 'dummy' wholesaler to make sales at terms actually controlled by the manufacturer." *Barnosky*, 665 F.2d at 84. This is not the scenario in this case. No evidence has been presented suggesting that the wholesalers which sell to the plaintiffs are in some way connected or affiliated with Philip Morris.

In *Barnosky*, the Court stated, "The indirect purchaser doctrine normally raises a factual issue not properly resolved prior to trial." *Id.* However, the Court went on to conclude that because it found that Barnosky was not a "dummy" wholesaler its resale customers could not be deemed to have purchased from the defendant for purposes of the Robinson-Patman Act. *Id.*; *see also*, *Hiram-Walker v. A & S Tropical, Inc.*, 407 F.2d 4, 8 (5th Cir. 1969) , *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Pierce v. Commercial Warehouse Div. of Thompson Automotive Warehouse, Inc.*, 876 F.2d 86, 88 (11th Cir. 1989). Likewise, because the eight indirect-purchasing plaintiffs have failed to establish that they are purchasers pursuant to the indirect purchaser doctrine, they lack standing to assert claims under the Robinson-Patman Act.

Appendix B

Accordingly, the defendant's motion for summary judgment shall be granted with regard to the claims of All Brands Vending, B&H Vendors, B&G Enterprises, Belfiore Music & Cigarette, Class A Vending, Eagle Coin Machine, Melo-Tone Vending and T. D. Rowe, and partial summary judgment shall be granted with regard to the claims of Penn Vending and C.I.C. that are based upon the products that they indirectly purchased from Philip Morris.

B. Competition

Assuming *arguendo* that the ten plaintiffs can show that they have standing to assert claims under the Robinson-Patman Act, the defendant also contends that the ten plaintiffs have failed to show that their vending machines are in competition with the retailers who participate in Philip Morris, promotional programs and receive the various promotional and advertising services that are exclusively offered to members of these promotional programs.

To establish a prima facie case of liability under Sections 2(a), (d) and (e) of the Robinson-Patman Act, the plaintiffs must show that the defendant's violations of those sections had an anticompetitive impact. *Parrish v. Cox*, 586 F.2d 9, 11 (6th Cir. 1978). Thus, the plaintiffs must show that they are in competition with the retailers participating in the defendant's promotional programs and that both parties "operate on the same functional level of competition within the same commercial market." *Id.*

At the preliminary injunction hearing held before this Court on June 2, 1999, the defendant's expert witness,

professor John Siegfried, testified that convenience stores (retailers) and the plaintiffs' vending machines are on the same functional level, i.e., they both sell packs of cigarettes to adult smokers. Transcript (filed June 7, 1999; Docket Entry No. 115) of preliminary injunction hearing at 218. However, he determined that the evidence did not indicate that the plaintiffs' vending machines compete with convenience stores (retailers). This Court agrees.

At the preliminary hearing, the plaintiffs' expert witness, Dr. Mark Cohen, testified:

> In order to determine whether two products or two companies are in competition with each other, economists generally ask what the "cross-price elasticity" of demand is for the two products. That is, we want to know what happens to the quantity of cigarettes sold at convenience stores when prices at vending machines increase.

Id. at 120-21. Likewise, Professor Siegfried testified that cross-price elasticity "is the responsiveness of sales in one channel of distribution . . . when there is a price change in the other channel of distribution." *Id.* at 224. *See also, United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 400, 76 S.Ct. 994, 1010, 100 L.Ed. 1264, 1283 (1956) ("An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other.").

As this Court stated in its earlier ruling denying the plaintiffs' motion (filed March 17, 1999; Docket Entry No. 14)

for preliminary injunction, the plaintiffs' expert witness did not perform any empirical studies to verify his conclusion that the defendant's promotional programs caused injury to competition. Transcript (filed June 15, 1999; Docket Entry No. 120) of ruling on motion for preliminary junction at 7. This Court also noted that other factors were presented "such as the proliferation of convenience stores, the increased awareness of health risks caused by smoking, and the change in the regulatory environment, which may account for any injury to the plaintiffs' businesses." *Id.* The Court found that the plaintiffs had "failed to explore fully the difference in impact that these factors may have had on their businesses, if any, with the impact that the defendant's promotions have had, if any." *Id.* at 8.

In an attempt to address the Court's findings, the plaintiffs retained Dr. Stacey Newbern to conduct a study to show that the defendant's promotional programs affected competition between participating retailers and the plaintiffs' vending machines. Dr. Newbern's study was comprised of 315 adult smokers who were surveyed in bar settings located in Boston, Massachusetts; Philadelphia, Pennsylvania; and Washington, Pennsylvania. Of the total people surveyed, she found the following: 90.7% recently purchased cigarettes at convenience stores; 71.2% purchased cigarettes from vending machines within the last six months; 57.4% bought at convenience stores more than three blocks away from the particular bar where the study was being conducted; the gas station mini-mart (41.8%) was the most common type of convenience store in which cigarette purchases were made; 40.2% responded that the reason for purchasing at convenience stores was the easy access, 26.4% stated that the reason was because the price was cheaper than vending

machines and 17.7% reported that the reason was because they visit convenience stores frequently; 50.5% stated that price influenced where they purchased their cigarettes; and in answering the question, "What price difference between vending machines and stores would influence you to buy from a store instead of a vending machine?", 44.4% responded that 50¢ to $1.00 would influence them, 35% stated that more than $1.00 would and 20.6% answered that 50¢ and less would influence them. Appendix (Docket Entry No. 172), attachment thereto, Exhibit 2, testimony of Dr. Stacey Newbern.

The plaintiffs retained Professor Philip Fanara, Jr., to review the results of Dr. Newbern's study.[6] He found the following:

> In conclusion, economic theory and the empirical data provided by the Cigarette Purchasing Survey provide substantial support that vending machines compete on the same functional level as convenience stores, and the impact of discriminatory pricing or of any nonproportional promotional fees that favored convenience stores

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6. The defendant has moved to strike (filed June 29, 2000; Docket Entry No. 178) the expert testimony of both Dr. Newbern and Professor Fanara. The plaintiffs have also filed a motion (filed June 14, 2000; Docket Entry No. 168) to strike the testimony of the defendant's expert witnesses. As will be addressed *infra*, because the Court finds that the plaintiffs have failed to present a sufficient factual foundation to support Professor Fanara's expert opinion, the court does not need to address the issues raised in the parties' motions, and the motions shall be deemed moot.

over vending machines would substantially reduce vending machine sales.

Id., Exhibit 4, testimony of Professor Philip Fanara, Jr., at 6.

The Court finds Professor Fanara's conclusion unpersuasive. As stated earlier, in determining what the "cross-price elasticity" of demand is for two products, economists look at the responsiveness of sales in one channel of distribution when there is a price change in the other channel of distribution. The data collected by Dr. Newbern, which Professor Fanara relies on in formulating his opinion, does not reflect whether smokers switched from using vending machines to purchasing their cigarettes solely at convenience stores in response to the defendant's promotional programs. For example, Dr. Newbern's test reveals that 90.7% of those surveyed had recently purchased cigarettes at convenience stores, and 71.2% surveyed had purchased cigarettes from vending machines within the past six months. However, these numbers do not reveal "the responsiveness of sales in one channel of distribution . . . when there is a price change in the other channel of distribution." Transcript (Docket Entry No. 115) of preliminary injunction hearing at 224. These numbers merely reflect that some people purchase cigarettes from both sources. The study does not show a correlation between the sales made at participating convenience stores and the sales achieved by vending machines during times that the defendant's promotional programs were in effect. The study also does not reflect which convenience stores participated in which of the defendant's promotional programs.

Further, in determining the cross-price elasticity of demand, the plaintiffs have not presented evidence showing at what point price will outbalance convenience. Historically, vending machine cigarette prices have been higher than those purchased in convenience stores. The plaintiffs' expert, Dr. Cohen, testified that "vending machine cigarette prices generally carry a small premium of 50¢ per pack or more" than cigarette prices found in convenience stores. *Id.* at 137. However, the plaintiffs have yet to present reliable evidence showing at what point an increase in the price of the plaintiffs' cigarettes will compel patrons of an establishment to forego the convenience of purchasing cigarettes from a vending machine on site and cause them to leave the site in order to purchase their cigarettes elsewhere. Without such evidence, the plaintiffs have failed to demonstrate that the two channels of distribution compete with each other. Moreover, Dr. Cohen testified, "I would never argue that every vending machine that's out there is being competitively injured by convenience stores." *Id.* at 156.

Additionally, in determining the cross-price elasticity of demand between cigarettes purchased from vending machines and those purchased at convenience stores, Dr. Newbern's study and Professor Fanara's assessment fail to reflect the degree of impact that other economic factors may have on the plaintiffs' businesses. As the record reflects, from 1972 to 1998, United States factory shipments of cigarettes, which roughly equate to retail sales, declined about 16%. Plaintiffs' response (filed July 19, 2000; Docket Entry No. 203) to defendant's statement of undisputed facts, ¶ 19. During this period, nationwide domestic cigarette sales through vending machines declined about 90%, and cigarette sales volume

declined by about 9%. *Id.*, ¶¶ 20--21. In 1996, vending machine sales volume declined by 30% and dropped an additional 5.4% in 1997. Transcript (Docket Entry No. 115) of preliminary injunction hearing at 202. One of the plaintiffs, Mr. Joseph Belfiore, testified that the cigarette vending machine business was not as lucrative as it had been in the past and that this change had been occurring gradually over the past years. *Id.* at 65.

According to Dr. Cohen, this decline in vending machine sales is attributed to the overall decline of smoking in the United States and the increasing regulatory restrictions on cigarette vending machine locations in order to reduce the availability of cigarettes to minors. *Id.* at 123, 202. As a result, vending machines are generally located in adult-only or restricted access sites. *Id.* However, Professor Siegfried testified that other contributing factors to the decline of vending machine sales include business failures of location owners, competition from other vending operators and demands for high commissions of sales by location owners. *Id.* at 202. Professor Siegfried also testified that in order to determine whether the plaintiffs compete with convenience stores, "it's necessary to examine the individual business circumstances facing each vending machine. . . . because . . . circumstances vary significantly from one machine location to another." *Id.* at 187. Mr. Valentine, an owner of Class A Vending, testified that the location of an establishment and the type of clientele that patronizes the establishment are factors used in setting a price for a cigarette vending machine. *Id.* at 97-98.

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Based on the lack of evidence showing competition between the plaintiffs and convenience stores and because of the plaintiffs' failure to explore fully the difference in impact that other economic factors may have on their businesses as opposed to any impact that the defendant's promotional programs may have caused, the Court finds that the plaintiffs have failed to establish sufficient facts to validate their expert testimony and, thus, have failed to establish that the plaintiffs compete with convenience stores. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S.Ct. 2578, 2598, 125 L.Ed.2d 168, 198 (1993).

> [E]xpert testimony without such a factual foundation cannot defeat a motion for summary judgment. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. . . . Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."

Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1198-99 (3rd Cir. 1995) (quoting *Brooke Group*, 509 U.S. at 242, 113 S.Ct. at 2598, 125 L.Ed.2d at 198). "As we observed in *Matsushita*, 'expert opinion evidence . . . has little probative value in comparison with the economic factors' that may dictate a particular conclusion." *Brooke Group*, 509 U.S. at 242, 113 S.Ct. at 2598, 125 L.Ed.2d at 198 (*quoting Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S.

574, 594 n. 19, 106 S.Ct. 1348, 1360 n. 19, 89 L.Ed.2d 538, 557 (1986)).

The ten plaintiffs have failed to establish that they compete with convenience stores in the sale of cigarettes and, therefore, have not met their burden of establishing a prima facie case of antitrust violations by the defendant under the Robinson-Patman Act. Accordingly, the defendant's motion for summary judgment with regard to all ten plaintiffs is granted.[7,8]

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7. Pending before the Court are several motions: the plaintiffs' motion (filed June 14, 2000; Docket Entry No. 168) to strike the testimony of defendant's expert witness, the defendant's motion to strike (filed June 29, 2000; Docket Entry No. 178) the expert testimony, the plaintiffs' motion (filed July 5, 2000; Docket Entry No. 185) for the production of documents needed to respond to motion for summary judgment, the defendant's motion (filed July 14, 2000; Docket Entry No. 192) to strike the plaintiffs' unauthorized filing of rebuttal expert testimony and the defendant's motion (filed July 14, 2000; Docket Entry No. 194) to strike the plaintiffs' unauthorized "reply" to opposition to the plaintiffs' motion to strike expert witnesses. In accordance with the granting of the defendant's motion (Docket Entry No. 170) for summary judgment, these remaining motions shall be dismissed as moot.

8. As the Court has found that the plaintiffs have not presented a genuine issue of material fact with respect to their claims under the Robinson-Patman Act, the defendant's argument that the plaintiffs have failed to show an injury to competition is moot.

Appendix B

IV.

In conclusion, the Court finds that eight of the plaintiffs[9] lack standing to bring their claims under the Robinson-Patman Act and that the two remaining plaintiffs[10] lack standing on their claims that are based upon the products that they indirectly purchased from the defendant. The Court also finds that all ten of the plaintiffs have failed to show that their vending machines are in competition with the retailers who participate in the defendant's promotional programs. Accordingly, the Court shall grant the defendant's motion (Docket Entry No. 170) for summary judgment on the plaintiffs' claims under the Robinson-Patman Act.

An appropriate order shall be entered.

s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge

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9. James A. Lewis d/b/a B&H Vendors; B&G Enterprises, Ltd.; Eagle Coin Machine; All Brands Vending Co., Inc.; Belfiore Music & Cigarette Co.; Class A Vending; Melo-Tone Vending, Inc. and T. D. Rowe Corp.

10. Penn Vending Company and C.I.C. Corporation.

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-99-0099
Judge Higgins

JAMES A. LEWIS d/b/a B&H VENDORS, et al.

v.

PHILIP MORRIS INCORPORATED

ORDER

In accordance with the memorandum contemporaneously entered, the defendant's motion (filed June 29, 2000; Docket Entry No. 170) for summary judgment is granted with regard to the claims of the eight indirect-purchasing plaintiffs, All Brands Vending, B&H Vendors, B&G Enterprises, Belfiore Music & Cigarettes, Class A Vending, Eagle Coin Machine, Melo-Tone Vending and T. D. Rowe, and partial summary judgment with regard to the claims of Penn Vending and C.I.C that are based upon the products that they indirectly purchased from Philip Morris, on the issue of standing.

The defendants' motion for summary judgment is granted as to all ten designated plaintiffs on the issue of competition.

Accordingly, the plaintiffs' claims are dismissed with prejudice.[1]

It is so ORDERED.

s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge

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1. Pending before the Court are several motions: the plaintiffs' motion (filed June 14, 2000; Docket Entry No. 158) to strike the testimony of defendant's expert witness, the defendant's motion to strike (filed June 29, 2000; Docket Entry No. 178) the expert testimony, the plaintiffs' motion (filed July 5, 2000; Docket Entry No. 185) for the production of documents needed to respond to motion for summary judgment, the defendant's motion (filed July 14, 2000; Docket Entry No. 192) to strike the plaintiffs' unauthorized filing of rebuttal expert testimony and the defendant's motion (filed July 14, 2000; Docket Entry No. 194) to strike the plaintiffs' unauthorized "reply" to opposition to the plaintiffs' motion to strike expert witnesses. These remaining motions are dismissed as moot.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 30, 2004

Nos. 01-6174/6502

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES A. LEWIS, DOING BUSINESS AS B&H VENDORS, ET AL.,

Plaintiffs-Appellants,

v.

PHILIP MORRIS INCORPORATED,

Defendant-Appellee.

BEFORE: MOORE and ROGERS, Circuit Judges; and KATZ,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

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* Hon. David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 9, 2004

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No: 01-6174: 01-6502

JAMES A. LEWIS, doing business as B&H Vendors; et al.

Plaintiffs - Appellants

v.

PHILIP MORRIS INCORPORATED

Defendant - Appellee

ORDER

BEFORE: MOORE and ROGERS, Circuit Judges; KATZ,* District Judge.

Upon consideration of the appellee's motion to stay the mandate,

It is ORDERED that the mandate be stayed to allow appellee time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not timely filed.

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* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

Appendix D

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk